

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Louis Van der Walt
AND Able Metal Products Limited
REPRESENTATIVES Tom Skinner for applicant
Pavez Akbar for respondent
MEMBER OF AUTHORITY Janet Scott
INVESTIGATION MEETING 13 September 2006
DATE OF DETERMINATION 21 February 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant submits he was unjustifiably dismissed. To remedy his alleged grievance he seeks lost remuneration, compensation pursuant to s.123 (1)(c)(i) and costs.

[2] The respondent denies the claim.

Background

[3] Louis Van der Walt is a recent immigrant from South Africa. His profession is that of a fitter/welder/sheet metal fabricator. In February/March 2006, he was in contact with a placement agency, Appointments Recruitment Specialists Limited, looking for a new job. At the corresponding time, Able Metal Products was looking for a contracts engineering manager. Able Metal Products Limited fabricates and manufactures a variety of metal products for building and associated industries. It employs between 9 and 15 staff, depending on the workload.

[4] As I understand the evidence, the recruitment agency emailed Mr Elstob, director of Able Metal Products Limited with Mr Van der Walt's details. Mr Elstob did not respond to the email because he was not looking for a fitter/welder. He wanted someone to fill an engineering position to manage the company's contracts.

[5] Shortly thereafter, the recruitment agency highlighted Mr Van der Walt's project management and supervisory experience to Mr Elstob. Mr Elstob interviewed Mr Van der Walt and, based on his CV, the recommendation of the recruitment agency and the interview held with Mr Van der Walt, offered him the position of contracts engineering manager. It was the second most senior position in the company and to meet Mr Van der Walt's remuneration expectations without disturbing internal relativities it was agreed that he would be paid \$26 per hour for a 56-hour week. In reality this amounted to remuneration of \$75,712 per annum. The title of the position was also amended from

that of Contracts Engineering Manager to Fitter/Welder/Fabricator/Supervisor. This was done to meet the requirements imposed by the Immigration Service in relation to the work visa held by Mr Van der Welt. The associated job description did not, however, change and in reality Mr Van der Walt was employed in a very senior position to manage the company's engineering contracts. The remuneration agreed between the parties reflected the seniority of the position.

[6] Mr Van der Walt commenced his employment on 8 May 2006.

[7] Mr Elstob's evidence was that it very quickly became apparent to him that the applicant had seriously misrepresented his skills and abilities and was not suitable for the position. Among the concerns he had were:

- Mr Van der Walt's failure to understand how a schedule of quantities worked and its relevance to the work being carried out.¹
- Very poor drawings – sometimes illegible or having missing or inaccurate information.
- Regularly interrupting other employees for information which he should have known at his level of seniority and demanding that information be provided instantly.
- Mr Elstob had to teach Mr Van der Walt basic maths.
- Mr Van der Walt could not make simple decisions he was paid to make.
- Mr Van der Walt inquired about matters that had already been discussed with him that day or the day previously.
- Being unaware or not acquainting himself with the tools and machinery in the office, often inquiring about them, their capacity or their limitations. For example, he was in the factory every day but he was unaware the company had a lathe.
- He failed to fill in the company's timesheets correctly.

[8] In response to what the respondent saw as a clear inability to undertake the work required at the level required, Mr Elstob decided to give the applicant small sections of work so that any initial problems with his work could be identified and dealt with and this also had the benefit of avoiding an overload of information for Mr Van der Walt. Despite this, there was no improvement in Mr Van der Walt's performance and no sign of the skills and abilities that the applicant had represented himself as having and that were essential to the position that he occupied.

[9] A meeting was held between Mr Elstob and Mr Van der Walt on 22 May. Mr Elstob expressed his concerns to the applicant and the applicant was reminded that a major aspect of his role was quoting site measurements, supervision of staff and installation of works on site where necessary. It was brought to Mr Van der Walt's attention that he was the second highest paid employee in the company, however his skills were not commensurate with this. Mr Elstob advised Mr Van der Walt that he was of the view that he had misrepresented his skills and abilities.

[10] Given the seriousness of the situation, Mr Elstob advised the applicant of a review on 2 June 2006 and Mr Van der Walt was advised that if his performance was not satisfactory it may result in the termination of his employment. In the interim Mr Van der Walt was directed to concentrate on the sales aspect of his role. This was because Mr Elstob did not want him measuring or detailing

¹ A schedule of quantities is a verbal description of work to be carried out on the contract/project to be read in conjunction with the drawings and specifications.

jobs or organising work because of the risk of serious mistakes and re-work. Part of the agreement reached between the two men on 22 May was that Mr Van der Walt would finish drawings he was working on and get all the documentation ready for issuing to the factory for manufacture. That work was to be completed with Mr Van der Walt concentrating on sales activities from the following Monday 29 June. Mr Elstob confirmed all this in a letter to the Mr Van der Walt dated 25 May 2006. That letter included the following statement:

“I will review your performance again next Friday 2 June 2006 and if you are not making a significantly greater contribution I will have to terminate your employment”.

[11] As I understand the evidence, when Mr Elstob requested the applicant to provide the documentation that had been spoken of at their meeting on 22 May it turned out the applicant had only completed the documentation for one part of the job. Mr Van der Walt told Mr Elstob that he was unaware he had to complete documentation for all parts. This was a further example of Mr Elstob’s view that Mr Van der Walt did not have the basic knowledge for even a junior position, let alone a contracts engineering manager’s job.

[12] It was the respondent’s position that as a small business the company was unable to continue to keep someone in a position of a well-paid senior manager who was clearly unsuitable for the role. It was a financially unsustainable position and it had arisen solely as a result of the applicant’s misrepresentations. As a result, Mr Elstob terminated the applicant’s employment and confirmed this by letter dated 6 June 2006 (The date 6 June was a mistake and the letter was supposed to record his dismissal on 2 June).

[13] Mr Elstob’s evidence was that he was, however, mindful of the applicant’s immigration status and he decided to try to assist the applicant and offered him an alternative position of sales consultant/ estimator new business. He thought this might be more suitable for the applicant as he had been on occasion quite impressed with the applicant’s sales manner. Mr Elstob’s evidence was that he did this with a genuine desire to assist the applicant, given his particular circumstances.

[14] *Mr Van der Walt has a very different perspective of his early employment with the company. It is his position that he told the company he was not an engineer. It is also his evidence that he was never appropriately inducted into the company, that basic support was denied him and that in fact he was belittled and subjected to verbal abuse by Mr Elstob.*

[15] It is his evidence that on 12 May (shortly after he commenced) two employees were laid off because there was little work. One week later he was asked to undertake marketing duties because there was no work. He agreed to do this because marketing fell within his job description. He accepts that he received a letter from the respondent dated 25 May which raised performance concerns. However, it was his position that he considered that up until this time he thought he was in the induction or training phase of the job.

[16] There is no dispute between Mr Elstob and Mr Van der Walt that after Mr Van De Walt was notified on his dismissal on 2 June and offered a new position that there was a meeting between the two men on 6 June to attempt to resolve the issues between them. This meeting was also attended by Mr David Luttig who, it seems, facilitated the discussions.² The evidence suggests that the discussions were positive in pointing a way forward in the relationship i.e. that Mr Van der Walt would accept the new role offered to him. This position was described as Fitter/Welder/Fabricator/Site Installer/Estimator/Sales. Again, the job title had been framed to comply with the requirements of Mr Van der Walt’s work visa. Essentially, however, the position

² Mr Luttig believes the meeting occurred on 8 June. Nothing turns on this.

was a sales role which required Mr Van der Walt to make regular contact with the company's clients and to develop new business; to achieve sales (within two months) of \$40,000 per month; to undertake estimating and pricing with sufficient engineering detail and to keep appropriate records. The salary associated with this role was \$56,000 per annum plus commission.

[17] After the meeting on 6 June with Mr Luttig, Mr Elstob and Mr Van der Walt met again (on more than one occasion) to finalise the details of their new arrangements.

[18] It is the respondent's position that Mr Van der Walt accepted the new position offered to him. A formal job offer was provided to Mr Van der Walt on 12 June together with a new IEA incorporating all the terms that had been agreed between them in discussions. As had been the case with Mr Van der Walt's earlier contract the new contract contained a probationary employment clause of one month. Mr Van der Walt worked in the new sales role from 12 June and his new remuneration was paid from that date. However, it was Mr Elstob's evidence Mr Van der Walt did not perform in his new role and the respondent's concerns were brought to his attention in a letter dated 19 June.

[19] Coinciding with this the applicant had, on 16 June, requested a week's unpaid leave. The request was made orally and Mr Elstob advised that he was not in favour of granting leave to Mr Van der Walt as this time – believing that he needed to focus on coming to grips with his job. Mr Van der Walt repeated his request to Mr Elstob on 20 June. (He wanted the leave to take part in a radio competition). Mr Elstob formally declined to allow Mr Van der Walt to take the leave requested³. He advised Mr Van der Walt that his performance to date had been poor and that he wanted Mr Van der Walt to focus on succeeding in his job. He did not think that a week's leave would assist in this regard or help the company. In declining the leave request Mr Elstob advised he would be happy to discuss leave with Mr Van der Walt in the future when leave was due and there was an improvement in his performance. In closing he reminded Mr Van der Walt that he had not returned his signed contract for the new position.

[20] Mr Van der Walt left his employment that afternoon. He did not return to the workplace. The respondent's position is that Mr Van der Walt stormed out of the workplace about 3pm on the afternoon of the 21st when his request for leave was declined. He did not return that day and he did not come to work on 22 June. Mr Elstob was concerned because a tender that Mr Van der Walt had been working on had to be finalised and submitted by 4pm that day. That morning Mr Elstob rang Mr Van der Walt to advise him that he was required to come to work to complete the tender. Mr Van der Walt said that he had a personal grievance and had gone to the Employment Relations Authority. Mr Elstob rang him again after lunch and again asked him to come to work and complete the tender he had been working on. Mr Van der Walt replied that he would not return to work but would attend on the 23rd. Mr Elstob asked him if he realised the direction to return to work was a lawful and reasonable instruction and that he could be dismissed if he failed to comply. Mr Van der Walt repeated he had gone to the Employment Relations Authority and would come to the workplace the next day to return the company's property. Mr Elstob took it from this that Mr Van der Walt had no intention of working for the company again.

[21] It is the company's position that Mr Van der Walt abandoned his employment on 22 June. However, Mr Elstob did write to Mr Van der Walt that day. He stated "*I have no other alternative but to terminate (or withdraw) the Employment Agreement you refuse to sign...I will work through any issues you have with this letter tomorrow*".

[22] Mr Van der Walt has a very different view of the events that followed his dismissal on 2 June. He accepts there was a meeting between himself and Mr Elstob on 6 June – the meeting that David

³ Letter dated 21 June.

Luttig attended. He also accepts there were ongoing discussions with Mr Elstob on the terms of the new position that Mr Elstob offered him. However, it is his position that no agreement was reached on the new position and he never signed the new contract presented because he did not agree with the terms offered. It is his position that from 12 June he continued working in the marketing role he commenced on 29 May and that the reduction in salary that he received from 12 June was forced upon him by Mr Elstob who told him he could accept the new remuneration or take his things and leave. It was Mr Van der Walt's evidence that he told Mr Elstob that he did not accept the terms offered.

[23] He also stated that the last straw for him was the respondent's refusal of his request for unpaid leave. He had had enough of the respondent's abuse.⁴ He left the workplace that afternoon and went to the Employment Relations Authority to find out about his rights. He returned to the Authority and lodged an application of personal grievance on the 22nd. While he was at the Authority Mr Elstob telephoned him and directed him to come to work. During their second telephone conversation that day he was again told to come to work. When he declined Mr Elstob told him to return his keys and phone. Mr Van der Walt asked if he was being fired. In the event he went to the workplace on the 23rd to return the company's property and to retrieve his own personal belongings. He says he was denied access to his own property and required police assistance to deal with the situation.

Legal Test

[24] The Employment Relations Act 2000 was amended in 2004 by the insertion of a new section 103A:

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.

[25] In determining this matter I must make an objective assessment of the employer's actions and weigh those actions against those of **a fair and reasonable employer ...in all the circumstances ...at the time....**

[26] The Court has recently examined the test for justification (Air New Zealand v Hudson unreported AC 30/06). It was held there that the effect of s.103A is to separate out the employer's actions (including the decision to dismiss) for evaluation by the Authority or the Court against the specified objective standard of what a fair and reasonable employer would have done in the circumstances.

[27] At paragraph 144 the Court said in respect of the case before it:

"The question is how would a fair and reasonable employer have acted in all the circumstances of this case. An employer does not have to prove that the incident which it characterised as serious misconduct happened. It must, however, show that it carried out a full and fair investigation which disclosed conduct which a fair and reasonable employer would regard as serious misconduct. The employer is not required to conduct a trial or even a judicial process but there are some fundamental requirements of natural justice which are appropriate and which, in this case, are reinforced by the company's policies. As part of a full

⁴ He did accept that the respondent had the right to decline the leave sought.

and fair investigation, natural justice requires that an employee is given a proper opportunity to comment on the allegations made against her”.

[28] The Court noted that the objects of the Act including the obligation of good faith must inform any objective assessment of what a fair and reasonable employer would do.

Discussion

[29] Mr Van der Walt’s claim and his evidence were confusing. I understand he has not raised a claim about the termination of his employment on 22 June 2006. However, for the sake of certainty and with a view to resolving the problems between the parties in their entirety, I will address the ending of the relationship on 22 June 2006 as well as Mr Van der Walt’s claim that he was unjustifiably dismissed on 2 June 2006.

[30] I have said that Mr Van der Walt’s evidence was confusing. It was also inconsistent with the contemporaneous written exchanges between the parties. As a result where the evidence is in dispute it is the evidence of the respondent’s witnesses that I prefer.

[31] This is essentially a story of a very poor selection and appointment process undertaken by the respondent. I find the applicant did misrepresent his skills and experience but ultimately it was the respondent’s responsibility to assess the applicant’s suitability for the position prior to making the appointment. The respondent did not do so and having made a very poor appointment it bore the burden of providing Mr Van der Walt with the support and assistance necessary and the time to show he could undertake the role to the company’s satisfaction – albeit I agree the respondent was not required to provide the skills training required for the position. What was required I find was a more formalised and lengthy period of skills assessment and induction into the new position and a longer period for the applicant to show improvement than was provided to Mr Van der Walt. It was also inappropriate to simply dismiss Mr Van der Walt on the 2nd June without discussing with him his failure to complete the job he was assigned to complete before he was to commence on the estimation duties the parties agreed on. Mr Van der Walt’s dismissal was unjustified.

[32] Having said this I find that Mr Van der Walt – having initially objected to the termination of his employment on 2 June - went on to agree on new terms with the respondent i.e. that he would be employed as a sales consultant/estimator on a revised salary of \$56,000 per annum. Any issues in the nature of an employment relationship problem (unjustified dismissal) were resolved between the parties when they reached agreement on the new position with Mr Van der Walt going on to work in the new role at the reduced salary offered. Mr Van der Walt considers that because he had not signed the new employment agreement he had not accepted its terms. I don’t accept this submission. Mr Van der Walt stated in writing on more than one occasion that he accepted the new position and I find that by 9 June 2006 all the outstanding issues relating to his new employment had been hammered out. On that basis Mr Elstob prepared a new offer of employment and a new employment agreement which he submitted to Mr Van der Walt for signature. I find that Mr Van der Walt never communicated any issue with respect to the new agreement and continued working in accordance with his stated acceptance of the new role and the associated terms.

[33] When Mr Van der Walt had his request for a week’s unpaid leave declined he simply walked out of the workplace. On one hand he submitted he could no longer put up with the respondent’s abuse. On the other hand he accepted the respondent was within its rights to decline the leave sought.

[34] The parties have different views relating to the ending of the relationship. Mr Elstob submitted that Mr Van der Walt was advised that the direction given to him to return to work to complete the tender due on 22 June was a lawful and reasonable instruction and that dismissal could result if he failed to comply. To this Mr Van der Walt said he was lodging a personal grievance for unjustified dismissal and would return the next day when it suited him. Mr Van der Walt said he told the respondent he was busy when he was telephoned on the 22nd and Mr Elstob just told him to return the company's property on the 23rd. He did so.

[35] Were the issue relating to the end of the relationship formally before me, I would have found that whatever the situation that existed after the discussions between the parties on the phone on 22 June, there is no doubt that Mr Elstob terminated Mr Van der Walt's employment by letter of the same day – a letter which I accept that Mr Van der Walt did not receive until he had finally left the workplace after an unhappy exchange on the 23rd.

[36] The respondent should have held back from dismissing Mr Van der Walt on the 22nd with a view to meeting him on the 23rd before taking any final decision regarding Mr Van der Walt's ongoing employment.. The employer's concern that he had failed to obey a lawful and reasonable instruction to return to work on the 22nd to complete the tender should have been put to Mr Van der Walt and he should have been given the opportunity to explain his conduct. Instead he was summarily terminated with effect from 22 June.

[37] Were this matter before me I would have found Mr Van der Walt was unjustifiably dismissed on 22 June. However, I would also have found that Mr Van der Walt's contribution to the situation which gave rise to his grievance was such as to disallow him any remedy in the matter. Mr Van der Walt knew the respondent was entitled to decline the unpaid leave he sought. Regardless he absented himself from the workplace at a time when a deadline for an important tender was imminent. When he was directed to return to work to complete the tender he refused to do so. In doing so Mr Van der Walt deliberately refused a lawful and reasonable instruction given by his employer and he contravened a explicit house rule. He was I find well aware of the house rule in question and aware that a breach could result in instant dismissal.

Determination

[38] Mr Van der Walt's application is declined. Any employment relationship problem he suffered as a result of his dismissal on 2 June 2006 was remedied between the parties following discussions.

Costs

[39] Costs are reserved. The parties are invited to agree on costs between them. If they cannot do so they are invited to file and serve submissions and costs will be determined by the Authority.