

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2013] NZERA Christchurch 212  
5415963

BETWEEN                      KRISTOPHER JAMES  
   AUSTIN  
   Applicant

A N D                              AQUACRAFT PLUMBING  
   LIMITED  
   Respondent

Member of Authority:        M B Loftus

Representatives:              Ben Austin, for Applicant  
   Mandi Coulter, for Respondent

Investigation meeting:        9 October 2013 at Christchurch

Submissions Received:        At the investigation meeting

Date of Determination:        9 October 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant, Mr Kristopher Austin, claims the respondent, Aquacraft Plumbing Limited, failed to pay a bonus as required by his employment agreement.

[2]     Aquacraft denies it was obliged to make the payment though it did, as part of on-going interaction, make an offer that effectively conceded. The offer was rejected.

**Background**

[3]     Mr Austin was employed by Aquacraft as an apprentice plumber. He commenced in November 2011 and, in the normal course of events, would have remained in Aquacraft's employ until completing the apprenticeship approximately four years later.

[4] His terms of employment were stipulated in a written agreement. Contained therein and pertinent to this dispute is clause 15. It is entitled *Bonus* and reads:

- 15.1 *Bonus on apprenticeship completion*  
*Aquacraft Plumbing Ltd will pay Kristopher Austin \$5000 on Completion of 8000 Apprenticeship hours within this company. This is a reward to acknowledge your commitment to training and loyalty to our company.*
- 15.2 *If the contract is terminated by Aquacraft Plumbing, the bonus will be worked out on a Pro-rata basis ie: every 1000 hours completed \$625 will be paid to the employee.*
- 15.3 *If the contract is mutually terminated by both parties the same terms apply as in clause 15.2.*
- 15.4 *If the employee's employment is terminated for breaching terms in this contract, NO Bonus will be paid.*

[5] On or about 8 November 2012 Mr Austin suffered an injury. He has not worked for Aquacraft since.

[6] On 5 February 2013, Aquacraft was told Mr Austin had recently been out on an all-night drinking session. Wondering whether this indicated a reasonable level of recovery, Aquacraft sent a text message reading:

*If u want to return to work u could start with part days and only doing the jobs that u feel up to doing, u r allowed to start back when ever u want or u can wait till the doc say they can't find any reason for u not to b working, let me know if u want to do this or what reason u have not to.*

[7] Later that day Mr Austin tendered his resignation. His stated reason was a desire to leave Christchurch and he advised he had been considering this for some time. With respect to notice he said:

*I realize in my C.P.I.T. apprentice contract I need to give 2 months notice but the Aquacraft contract states only 1 week so I will give up to 2 months notice from when I return to work.*

[8] Mr Austin says Aquacraft responded with a text message. He cannot remember the exact words but, according to his oral evidence, it was *along the lines of as you no longer want to be a plumber you won't need to do the next two months and you can do the date as 12 February.*

[9] While still dated 5 February, Mr Austin responded with an amended letter the following day. It replaces the paragraph in 7 above with *My last day therefore will be 12<sup>th</sup> February.*

[10] On 12 February, Aquacraft made a final payment of all outstanding wages and holiday pay. On the 15<sup>th</sup> Mr Austin wrote querying the lack of a bonus which led to further exchanges and an unsuccessful mediation.

[11] The exchanges came to a head on 29 June when Aquacraft sent a letter accompanied by a cheque. It was for the amount Aquacraft calculated it owed pursuant to clause 15.3 and assuming a mutually agreed cessation, plus a further \$77 to cover the Authority's filing fee and an additional \$200 toward Mr Austin's costs.

[12] Mr Austin rejected the offer and that led to the investigation meeting. He tells me the rejection stemmed from a view Aquacraft was not showing good faith in that it was offering an inadequate and minimal amount which did not cover costs and angst suffered as a result of its refusal to pay. He could not answer how this conclusion was reached given the amount exceeded that owing if the bonus had been payable.

### **Determination**

[13] Mr Austin's position, as enunciated in an email of 19 February 2013, is:

*... after receiving your text message request that the notice period be adjusted to 1 week, an amended letter of resignation was sent on the 6<sup>th</sup> February 2013. This forms the understanding that the contract was terminated mutually.*

[14] He also puts considerable weight on Aquacraft's letter of 29 June which, he implies, confirms his view the bonus was payable.

[15] Aquacraft denies the letter constitutes such a concession but reflects a practical approach. It contends its view the bonus was for completion of an apprenticeship was explained at Mr Austin's pre-employment interview but the dispute was costing time, and with that money, a small firm could ill afford. It was a case of cut its loss and dispose of the problem.

[16] Both parties agree the question to be determined is whether or not Mr Austin's employment was *mutually terminated by both parties.*

[17] I conclude the answer is no – it was not. Mr Austin initiated the process by giving a resignation into which he had put considerable thought. As conceded during submissions, it was Mr Austin's choice and there was no mutuality about the initial notice.

[18] The argument is mutuality arose by virtue of the subsequent discussion over a termination date. That came about as Mr Austin did not initially give a date. He noted his two agreements gave different answers on the issue, then left it open by saying he would give notice when he returned on an unknown future date.

[19] The evidence is the employer responded and indicated he did not have to wait. Mr Austin acted on that and specified a date which his oral answers say was not preordained by Aquacraft. Again the element of mutuality or agreement appears absent but even if that were not the case the outcome would not change.

[20] The Courts consideration of what constitutes a mutually agreed termination tends to arise in situations where the initial impetus has come from the employer and, even then, there is no clear delineation between a dismissal and a mutually agreed termination.

[21] As a general rule mutuality seems to arise where the parties are considering a problem raised by the employer which may well result in a termination and, as part of subsequent processes, an agreement is reached under which the employee departs. Examples include resignations tendered during a disciplinary process or a positive response to a call for voluntary redundancy (refer Hughes, Roth and Anderson *Personal Grievances* (looseleaf 2<sup>nd</sup> ed, LexisNexis NZ Limited) at 3.4). The present situation does not appear analogous to those examples.

[22] The Court tends to the view the crucial question is *whether the employer was the prime mover in the process of termination, and it should not matter that the employer has secured the agreement of the employee as to the terms on which the termination of his employment would occur* and whether the employee was coerced into the concluded agreement (refer Chief Judge Goddard, in *Marshall v TNL Freight Link*, [1997] 1 ERNZ 395, 405 citing Paul Davies and Mark Freedland, *Labour Law: Text and Materials*, 2nd ed, 453).

[23] In such instances a dismissal is considered to have occurred and not a mutually agreed termination. There is, I conclude, no reason why the opposite cannot apply.

[24] The discussion about when cessation would occur was nothing more than agreement on a necessary term applicable to a resignation already tendered. Mr Austin was *the prime mover in the process of termination*.

[25] The conclusion this was a resignation and not mutually agreed means Mr Austin is not entitled to the bonus contemplated by clause 15.3. Nor is he entitled to it under any of the other provisions in clause 15 of his employment agreement and that was not alleged.

[26] Finally I should refer to the letter of 29 June 2013 and possible concession of the claim. I do not consider it overturns the above conclusion. It was sent without benefit of legal advice and no real knowledge of Mr Austin's true entitlements in, according to the evidence, a desperate attempt to rid Aquacraft of an aggravation that was costing time and therefore money. In any event, the offer was rejected.

[27] For the above reasons I conclude Mr Austin is not due the bonus he claims. His application is dismissed.

### **Costs**

[28] Aquacraft has successfully defended the claim and in the normal course of events would be entitled to a contribution toward the cost of doing so. However Ms Coulter is an officer of the company and there are no legal costs. Recoverable costs, if any at all, are therefore negligible. Given a costs determination can be revisited and in order to avoid putting the parties to further effort and cost, I advise a view costs should lie where they fall.

M B Loftus  
Member of the Employment Relations Authority