

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 388/08  
5099451

BETWEEN                      KEITH BROWN  
   Applicant  
  
AND                              PHOENIX ITALIA LIMITED  
   Respondent

Member of Authority:      R A Monaghan  
  
Representatives:            K Brown, in person  
   N Raju, advocate for Respondent  
  
Investigation Meeting:     12 September and 23 October 2008  
  
Submissions received:     29 October 2008 from Applicant  
  
Determination:              12 November 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     Keith Brown says his former employer, Phoenix Italia Limited (“PIL”) dismissed him unjustifiably.     PIL denies there was a dismissal.     Both rely on the proper interpretation of a conversation occurring immediately before Mr Brown’s employment ended.

**The termination of the employment relationship**

[2]     Mr Brown’s employment with PIL began in April 2007.     He was employed at the company’s retail outlet as a salesperson.     The outlet had recently been opened, and had yet to attract large numbers of customers.     Staff were needed to assist in transferring stock to the new outlet, as well as storing, displaying and selling it.     Although Mr Brown was employed as a salesperson he was expected to assist with all moving of stock.     This was expressly recognised in the parties’ written employment agreement, which also referred to the hazards associated with manual handling tasks.

[3] The company makes and sells crushed marble statues, as well as ornaments for gardens or in homes. Some of the statues in particular are large and heavy.

[4] On or about 14 May 2007 Mr Brown injured his back while lifting a heavy statue from a prone to an upright position. He consulted his doctor on 17 May, and the matter was referred to the ACC. He was absent from work for the rest of that week, and attended work for 2 hours the following week. In the week beginning 28 May he attended work for 1 hour.

[5] Two medical certificates were provided to the Authority. There were other documents in the form of invoices from Mr Brown's doctor. While they might at least confirm the dates on which Mr Brown consulted his doctor, they are not medical certificates. PIL says, and I accept, that it received only two medical certificates.

[6] The first was dated 30 May 2007 and stated that Mr Brown would be fit to resume alternative duties on 3 June 2007. Mr Brown worked on 2.5 days in the week beginning 4 June.

[7] Navin Raju, the managing director of PIL, did not believe there were any alternative duties available. He sought to discuss the matter with Mr Brown, and did so at a meeting at the premises on or about 12 June 2007. It was common ground that the discussion addressed the fact that, since Mr Brown was unable to do any lifting, he had little to do other than sit and wait for customers. There was a consensus that in reality no alternative duties were available.

[8] Mr Raju drafted a letter dated 12 June, for production to the ACC or WINZ as Mr Brown thought necessary, confirming that the company could not offer alternative duties to Mr Brown. The copy provided to the Authority concluded with:

“I would like Keith to recover fully from this injury before he resumes his employment with us.

Keith is a very good worker and we would not like to lose him and I will try my best to hold his position as long as I can for him to resume his duties.”

[9] Mr Raju had a genuine concern, which he conveyed, about the risk of further injury to Mr Brown's back if he returned to work too soon. He sought medical clearance confirming Mr Brown's fitness to resume work, prior to such resumption.

[10] Mr Brown had reported for work on 11 and 12 June, but did not report for work for the rest of that week.

[11] A further medical certificate dated 14 June 2007 provided that Mr Brown was unable to resume any duties but would return to normal work on 28 June 2007. Mr Raju's wish for clearance meant that Mr Brown's mere reporting for work on 28 June would not suffice. Supporting material from Mr Brown's doctor confirming Mr Brown's fitness as at that date was necessary.

[12] Mr Brown did not report for work during the weeks beginning 18 and 25 June 2007.

[13] Mr Brown reported for work on 2 July 2007, believing that was the next working day after the expiry of his medical certificate. He simply began carrying out his usual duties. He did not seek to discuss his medical status, or offer confirmation of the kind Mr Raju had sought.

[14] PIL had been expecting Mr Brown to report for work on 1 July, but there was probably a misunderstanding about that. At the same time, on 1 July PIL's general manager, Darmesh Patel, had taken over some of Mr Raju's duties as Mr Raju had commenced an employed position of his own elsewhere. Mr Patel was aware of Mr Raju's wish that proper clearance be obtained before Mr Brown resumed full duties.

[15] When Mr Patel saw Mr Brown had started work, and noted Mr Brown had been lifting flagstones, he contacted Mr Raju for instructions. Mr Raju told him to speak to Mr Brown about his injury and whether he was fit to work. I accept the evidence of Messrs Raju and Patel that their principal purpose was not to effect the termination of Mr Brown's employment, but to obtain confirmation of his fitness to work.

[16] Accordingly Mr Patel asked Mr Brown to come into the office to discuss his injury. It was common ground that the two discussed the lifting requirements in Mr

Brown's job, and Mr Patel expressed the concern that Mr Brown could reinjure himself. Mr Brown replied that he was 'not 100%' and would have to be careful. Mr Patel's evidence was that he asked about medical clearance to work, but Mr Brown did not recall this and later denied it. Mr Patel's evidence was that Mr Brown responded by saying he was capable of lifting and repeating that he had to be careful.

[17] In the light of the background evidence which I have accepted, I consider it more likely than not that Mr Patel did request clearance. I would also accept he should have pressed the matter in more detail than he did. At the same time there was no evidence that clearance of the kind Mr Raju sought was available. Mr Brown simply returned to work, apparently without taking other steps such as first returning to his doctor and obtaining certification that he was now fit to resume full duties. He had not appreciated the importance to Mr Raju in particular of obtaining more than simply his reappearance at work. His comments that he would have to be careful did not amount to the reassurance that was sought.

[18] Mr Patel's evidence was that he told Mr Brown he had a choice. The work required heavy lifting and the company was concerned about his health. If Mr Brown could find other work, believed he could not cope, or wanted to leave, he could. Mr Brown responded that he would need to talk to his partner.

[19] Mr Brown's account was that he was told he could finish now and go home. He responded that he would need to talk to his partner. It was at least apparent that there was more to the discussion than the bare statement in Mr Brown's account. I find Mr Patel's account more likely and believe Mr Brown has paraphrased it too narrowly.

[20] In circumstances that are not clear, the fact that the employment agreement included a three-month trial period was brought up. Mr Brown said Mr Patel raised it first. He could not be specific about the context, other than to say he was told he would be reviewed at the end of his three-month trial and it came across to him that he was 'surplus'. He also said he was told his back injury may be addressed then, and he took that information as meaning his employment would end either immediately or at the end of the trial period. In a handwritten note he made relatively soon

afterwards, he recorded: 'I didn't know what to do my three month trial is up at the end of the month and then I could be let go.'

[21] Mr Brown's note also recorded that, when he returned from discussing the matter with his partner, he told Mr Patel 'I guess I don't have any choice its now or at the end of the month by the sounds of it. He then said I could go now ...'

[22] Even on Mr Brown's account, he was not told unequivocally that he could leave either there and then or at the end of the month. He was given the option of leaving there and then. He was given information to the effect that his fitness to work would be reviewed at the end of his trial period. He was not told his employment would be terminated at that time. While he recognised correctly that there were reservations about his fitness to work, there was no reason to assume his employment would terminate for any reason at the end of the trial period. Mr Patel did not say anything that could reasonably be taken as an indication that the termination of Mr Brown's employment at the end of the trial period had already been decided.

[23] Nevertheless Mr Brown concluded that he had a choice of leaving there and then, or at the end of the month. After consulting with his partner about what to do, he decided to leave there and then. He returned and informed Mr Patel that he had decided he would leave now.

[24] It was common ground that there were references in the discussion to the fact that Mr Brown had choices. Mr Brown believed the choices were as set out above. Mr Patel's understanding of the choices under discussion was different. He understood the choices concerned whether Mr Brown believed he was able to continue carrying out his duties without further injury, or whether he was not able to do so, the position was unsuitable for him, and he should leave.

[25] Accordingly when Mr Brown informed Mr Patel that he had decided he would leave there and then, Mr Patel understood him to have made a choice not to continue his employment. In turn Mr Patel effectively acknowledged that decision in confirming the termination of Mr Brown's employment.

**Whether there was a dismissal**

[26] As indicated, the outcome of this employment relationship problem turns on the proper interpretation of the conversation of 2 July.

[27] It was unwise of Mr Patel to raise the possibility of the termination of Mr Brown's employment without first emphasising more clearly than he did the importance of obtaining clearance to work from a suitably qualified person, and following the matter up. However I do not believe Mr Patel went as far as to close the door on the continuation of Mr Brown's employment, and he did not give Mr Brown the choice of leaving on 2 July or at the end of the trial period.

[28] Instead I find Mr Patel indicated that, if the employment did continue, there would be a review at the end of the trial period. There was no reason for Mr Brown to conclude that his employment would end at that time for any reason. It was premature to assume the employer would not address any further problems appropriately, should problems arise.

[29] I consider it likely, too, that the parties spoke at cross purposes when they discussed the choices available to Mr Brown.

[30] For these reasons I am not persuaded there was a dismissal.

**Costs**

[31] Costs are reserved.

[32] If either party seeks an order from the Authority there shall be 28 days from the date of this determination in which to send to the Authority, and copy to the other party, a written statement of the amount of costs they seek and an explanation of why. The other party shall have 14 days from the date of receipt of that statement in which to file in the Authority, and copy to the other party, a written reply.

R A Monaghan

Member of the Employment Relations Authority