

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Garry Edward Cantell (Applicant)  
**AND** Dempsey & Wood Civil Contractors Ltd(Respondent)  
**REPRESENTATIVES** Gregory Peploe, Advocate for Applicant  
Ross Henderson, Advocate for Respondent  
**MEMBER OF AUTHORITY** Dzintra King  
**INVESTIGATION MEETING** 16 May 2001  
**DATE OF DETERMINATION** 1 June 2001

DETERMINATION OF THE AUTHORITY

**Employment Relationship Problem**

1. The applicant, Mr Garry Cantell, says that he applied for the position of drainlayer with the respondent, Dempsey & Wood Civil Contractors Ltd. He attended two interviews, one on 10 October 2000 and a second one on 13 October. Mr Cantell says that at the conclusion of the second interview he was offered the position.
2. On 19 October Mr Conal Dempsey telephoned him to tell him that the company had been restructured and that there was no longer a position available for him.
3. The company's position is that there was no dismissal because no employment relationship was formed. There was no offer of employment and there were still unresolved issues between the parties at the conclusion of the second interview.

**Background**

4. Mr Cantell says that as well as offering him a position the company also agreed to hire his son. A pay rate was agreed for both him and his son and he was offered the position of site supervisor in charge of the subdivision at Swanson. Mr Cantell had previously run his own business, which he was in the process of winding down, and he needed some time to complete that before taking up the position with Dempsey & Wood.
5. The position of Dempsey & Wood is that while they would have been happy to have offered the position to Mr Cantell the pay rate that he sought was too high and a start date had not been able to be established because Mr Cantell needed time to wind down his business. They were also adamant that at no stage was a position offered to Mr Cantell's son.

6. There are some conflicts in the evidence in this case. However, I have no doubt that both the respondent and the applicant genuinely believed that what they said to the Authority was true.
7. The issue is whether or not Dempsey & Wood did in fact make the offer of a job to Mr Cantell. If an offer was made which Mr Cantell accepted then clearly there was an unjustified dismissal; if there was no offer and acceptance then no contract was concluded and there was no dismissal.
8. Least the parties feel that this short decision means that little consideration has been given to the matters traversed at the investigation meeting, I wish to reassure them that I have given a substantial amount of consideration to the matters that were discussed. I have looked carefully at the briefs of evidence and I have gone over the notes that I took during the meeting.

### **Decision**

9. The conclusion I have reached is that Mr Cantell was mistaken in his belief that the company had offered him a position. In saying this, I wish to reiterate that I have no doubt that he honestly believed that he had been offered a position and that he had accepted it.
10. Although the Authority is not required to state why it has made findings of credibility I think that the parties should know why I have come to this conclusion.
11. During the course of the investigation meeting Mr Cantell made statements on a number of occasions which he later, upon further questioning, qualified. He said, for instance, that after the end of the second meeting, he was told to start on Monday and turn up at the office and he would be given directions from there. A little later Mr Cantell accepted that that had in fact not been said at all but that it was what he had assumed.
12. In his brief Mr Cantell stated that when Mr Lowrey telephoned him on 19 October he advised that due to an internal restructuring of the company the offer of the jobs for both Mr Cantell and his son would be withdrawn. However, during the investigation meeting he accepted that Mr Lowrey had not referred to his son at all. Mr Lowrey said that when he telephoned Mr Cantell he told him that the position was no longer available but did say anything about withdrawing the job. I think Mr Cantell, believing that he had been offered a job, mentally transmuted the idea of the position's not being available into the offer being withdrawn.
13. A further reason I am persuaded that Mr Cantell was mistaken was that he asserted that his son had been offered a job. Messrs Dempsey and Lowrey stated that it was their policy to interview all staff and that they had even interviewed an existing staff member who was subsequently appointed to the drainlayer's position. At no stage had Messrs Dempsey and Lowrey seen or spoken to Mr Cantell's son. It is highly improbable that a company would agree to employ a person without ever having met that person or even spoken to him.
14. The company could not assume that Mr Cantell Junior even wanted the position and Mr Cantell Senior did not produce any authorisation that he was acting on behalf of his son.
15. For an offer to have been made to Mr Cantell's son, the contract would have had to be entered into personally between him and the company and I am convinced that at no stage was Mr Cantell Snr told that the company was offering his son a job. There was certainly discussion around this issue as there was discussion about a number of other issues. Mr Cantell in his desire to believe that he was being offered the position and wanting the position, believed that firm offers had been made when matters had only ever reached the stage of discussion.

16. It appeared from the evidence that the reason Mr Cantell had formed the view that his son had been offered a position was simply that there had been discussion about the pay rates that might be applicable if his son were to be employed; it was not that a statement to the effect that Mr Cantell's son was being offered a position had actually been made.

17. The company did not employ a second drainlayer.

18. I am satisfied that there were a number of issues that were still not agreed at the end of the second interview. These were the pay rate that Mr Cantell was to be paid if he had the position, whether or not he would be agreeable to work every Saturday and when he would actually be able to start work.

19. Mr Cantell was not offered a position. There was therefore no dismissal. There was a very unfortunate misunderstanding.

### **Costs**

The parties should first endeavour to resolve the matter of costs between themselves. If this is not possible, then the respondent should file a memorandum with the Authority within 28 days of the date of this decision and the applicant should file a memorandum in response 14 days after receipt of the respondent's memorandum.

**Dzintra King**  
**Member of the Employment Authority**