

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 52/09  
5136564

BETWEEN                      BRETT CARSTENS  
   Applicant  
  
AND                                SEVEN ELECTRICAL  
   LIMITED  
   Respondent

Member of Authority:        G J Wood  
  
Representatives:              Brett Carstens on his own behalf  
   Monica Singleton for the Respondent  
  
Investigation Meeting:        26 March 2009 at Wellington  
  
Determination:                27 April 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]        The applicant, Mr Brett Carstens, claims that he was unjustifiably constructively dismissed from his employment as an electrician with the respondent, Seven Electrical Limited (Seven). In legal terms, the thrust of Mr Carstens' claim is that he was unfairly picked on by representatives of Seven with the deliberate and dominant purpose of coercing him to resign. He described the situation as being taken apart as if he were the bull in a bull fight. Seven, by contrast, claims that it treated Mr Carstens fairly throughout and that he resigned of his own free will.

**Mr Carstens' Claims**

[2]        Mr Carstens claims that he was unfairly targeted in his work for Seven by his supervisor, and then later by his project manager in combination with the supervisor.

[3] His first major area of concern was that another supervisor had done untidy and unsafe work that he did not want to be involved in, and he told his supervisor that. Despite this, he claims that he was required to complete the work. In particular, he was concerned about the colour of the flex he had to install, which clashed badly with its surrounds. His view was that the supervisor required him to do the work despite the fact that he knew it was unsightly and that the supervisor had not discussed the colour issue with the architect, despite undertaking to do so.

[4] Mr Carstens continued to refuse to do the work. He says that, for this reason or others, the project manager started treating him differently and at one point asked him to resign. His concerns continued when, after a meeting held to clear the air, he was required to sign minutes that were completely inaccurate, particularly over the supervisor's and project manager's claims that they were not actively seeking Mr Carstens' to do the flex work. He believed the opposite.

[5] He also claims he was later wrongly and unfairly targeted over the loss of someone else's hard hat by the project manager, and not provided with replacement safety boots when they were needed and asked for.

[6] All these matters had got to Mr Carstens so badly that he started taking days off, and his productivity suffered. He claims his supervisor was threatening to him when he raised his concerns about that. He approached the managing director of Seven to be transferred to another site, but although he said he would look into it, nothing had happened before matters took a turn for the worse.

[7] Mr Carstens had taken extra time off and one day (after two absences that week) he was called into a discussion with his supervisor about his not having rung in when sick. Mr Carstens refused to agree to do that in the future and an argument ensued, with the project manager becoming involved at some point. Mr Carstens claims that he was told that he had been hiding onsite rather than working, which was not true, and that he was going to be kept under close surveillance from then on. He claims that he was then told that he was not going to get his transfer.

[8] Mr Carstens then left work for the day, saying that he was getting out of there. He went to see the managing director two working days later, in order to get his transfer. The managing director refused to consider a transfer and required him to go

back to the Chews Lane site and apologise. Mr Carstens had had enough at that point and left, never to return.

### **Credibility Issues**

[9] If the case is as Mr Carstens characterises, then he would be entitled to claim that he was unjustifiably constructively dismissed. The Authority can, however, only determine matters on the balance of probabilities; i.e. what is more likely than not. It is indeed possible that his assessment of matters is correct. However, the evidence in support of that came only from Mr Carstens himself. There were no supporting witnesses called. By contrast, the supervisor, project manager and managing director all gave evidence supporting Seven's position that its management did not intend to coerce Mr Carstens into resigning, nor did they breach their duties to him as an employer. An email from the architect confirms that, contrary to Mr Carstens' assertion, he was approached by the supervisor about changing the colour of the flex.

[10] In assessing credibility, I have also had regard to the fact that while Mr Carstens' evidence was consistent, so was that of the supervisor and the managing director. Only the project manager's evidence was shown to be subject to any exaggeration, particularly over the issue of whether Mr Carstens told him he was resigning at the time he walked off the Chews Lane site.

[11] Furthermore, in both of the main areas where Mr Carstens had a bust up with his employer, in law Seven was justified in its views. It was entitled to give Mr Carstens lawful and reasonable instructions over completing the flex work and to inform it if he were to be absent. I accept that the flex work was unsightly. Thus it was an affront to a skilled tradesman with an eye for the design aspects of an installation, like Mr Carstens. The fact remains, however, that the work required of him was not in breach of any industry or health and safety standards. Therefore Seven could reasonably have required him to do the work. In any event, he was not actually forced to do the work against his will, as in the end Seven got someone else to do it. Similarly, any employer is entitled to insist on its employees ringing in to tell them that they will not be at work on a given day. It is simply a matter of commonsense that an employer would want to know if its workers were attending or not, in order for supervisors and managers to be able to plan work on the site. In fact, Mr Carstens acknowledged as much and indeed during the last heated conversation did accept that he should ring up in future when absent.

[12] For all these reasons, there is no alternative but to conclude, on the balance of probabilities, the following facts, based primarily on the accounts of the supervisor and managing director, together with supporting documentation written close to the events in question.

### **Findings of Fact**

[13] Mr Carstens started work at Seven as an electrician on 3 April 2006. In early 2008 he started working on the Chews Lane development site under a supervisor and project manager.

[14] Around June 2008 Mr Carstens objected to the standard of work by another supervisor who had part completed some installing of cables and flex at apartments in Chews Lane. He was, however, still required to complete the work. When he commenced it he raised his concerns about the colour of the flex (black), as he felt that it would in effect create an eyesore, which would reflect badly on him and Seven. Mr Carstens is not only an experienced electrician but also has an interest in design, and felt that the colour and size of the flex was an extremely bad reflection on him, the company and the architect. He asked the supervisor to go back to the architect and suggest whether that was the colour intended. The supervisor did so, but the architect said to stick with black. The supervisor then told Mr Carstens that he was to do the work in black, but Mr Carstens refused to do so.

[15] The supervisor was concerned about this refusal, but put in someone else to do the work. He also, however, contacted the managing director, to see how Mr Carstens' behaviour should be dealt with. The managing director suggested that a meeting be held between himself, the supervisor, the project manager and Mr Carstens to sort matters out.

[16] I accept that, after the refusal, the project manager and Mr Carstens had a separate discussion about the flex work, which it was agreed was unsightly. I do not accept, however, on the balance of probabilities, given that this was a serious allegation, that the project manager asked Mr Carstens to resign at this point. This is not only because it is a serious allegation to prove (and support of it must be equally convincing as the allegation is serious), but also because Seven had no reason to get rid of Mr Carstens, as back then electricians were extremely difficult to recruit and

retain. I also note that this issue of Mr Carstens' resignation being sought was not mentioned at the meeting between the parties a few days later.

[17] I accept that at the meeting the managing director tried to ascertain what had happened and to resolve all issues between Mr Carstens and his supervisor and project manager. I also accept that the minutes of the meeting are accurate, even though they did not deal in detail with the issues raised. In particular, the document covers Mr Carstens' opinion that he had raised his concerns about the visual look of the installation on many occasions, and that he felt that the instruction to carry out the work was a deliberate attempt to force him to do something he did not want to do. I also accept that the notes cover the thrust of the response that the managers never intended to actively seek Mr Carstens out to do the work. As will become apparent later Mr Carstens disagreed with that, but the fact remains that the minutes accurately reflect what Mr Carstens was told at the meeting.

[18] Significantly, the notes record that all agreed that better communication was needed in the future and that ultimately the supervisor or project manager could require Mr Carstens to do work. I accept that given the meeting lasted over an hour the minutes do not reflect all that took place, but that they do accurately reflect the key points. However, Mr Carstens' claims that his supervisor and project manager were liars was not specifically covered, but are alluded to in the statement that the managers were deliberately attempting to force him to do something he did not want to do.

[19] Finally, I accept that it was not a disciplinary meeting, as the managing director is well versed in handling disciplinary meetings and there was no such preparation as would have been ordinarily been held in a disciplinary context. Furthermore, the result of the meeting was not any disciplinary action, but simply that a record of the meeting was provided in writing to all concerned.

[20] Unfortunately, when Mr Carstens was given a copy of the minutes prepared by the managing director a few days later, he refused to sign them. Mr Carstens considered that the minutes were deliberately manufactured so as to minimise his legitimate concerns. I do not accept that for all the reasons given above.

[21] Mr Carstens had a number of concerns that followed on from the meeting. One was an allegation that his supervisor warned him that he had better not be

reducing his productivity when he mentioned that he was not working as well as he had been. On the balance of probabilities, I do not accept that there was any conversation of that tone.

[22] Mr Carstens also felt victimised over the issue of a co-worker's missing hard hat. I do not accept that Mr Carstens was treated any differently from other workers, but perhaps he was particularly sensitive to any approaches from the managers.

[23] I do accept, however, that the managers did not assist Mr Carstens, as they should have, by ensuring he got new work boots. It was accepted that Mr Carstens had put the requests on the board (as required by policy), yet nothing was ever done about it. That is unacceptable.

[24] The project manager and supervisor kept away from Mr Carstens after the meeting with the managing director, in the hope to not alienate him. Ironically, this may have had the opposite effect.

[25] After the minutes were issued Mr Carstens started taking time off work. In his own words, he did not want *to turn a coin for liars who were progressively plotting towards his undoing at Seven*. When taking time off he failed to inform his supervisor each day that he was away.

[26] Mr Carstens decided that he wanted a transfer and telephoned the managing director accordingly. The managing director's evidence, which I accept, was that he was told it was not a major issue, but that he wanted it noted and would like to move sites as soon as possible. The managing director, however, did not have the opportunity to address this request in a concrete way before there was an altercation onsite again between Mr Carstens and his supervisor and the project manager.

[27] Mr Carstens had taken the Monday and Wednesday off in the last week of August 2008. On the Thursday he was approached by his supervisor who asked him where he had been. Mr Carstens replied that he had not been at work. He was asked if in future he would call in so that Seven could plan for his absence. Mr Carstens interrupted him and told him that there would be no point in that as he would not be working there much longer. The discussion soon degenerated into an argument and then the project manager intervened. After further discussion, Mr Carstens agreed that he would ring up in future.

[28] Mr Carstens was then asked to return to work. He left the managers' work area, again calling them a pair of liars. Mr Carstens in fact returned five minutes later, with his gear, and told them that he was *getting out of there*. The supervisor did not expect that that meant that Mr Carstens was leaving his employment, which I accept. He was not resigning.

[29] Mr Carstens went to see the managing director the following Monday. Needless to say the managing director was not impressed by the reports he had received about the altercation on the Thursday, nor by Mr Carstens' absence for that afternoon and Friday. He told Mr Carstens that he could not have a transfer, but that he should go back to his work site and make his peace with the management there. Mr Carstens told him that he was being constructively dismissed, the meaning of which the managing director did not understand at the time.

[30] Mr Carstens had had enough and went out and found a new job that very day. He emailed the managing director the next day, stating that he had acquired other employment with substantially increased remuneration and improved working conditions (neither of which was true) and that he would be taking unpaid leave for the period of his notice. His resignation was accepted.

### **Determination**

[31] As everyone involved concurred, the flex supplied did create a bit of an eyesore. As a tradesman with a genuine concern about industrial design and the quality of his work, Mr Carstens was entitled to be concerned about the work required of him. On the facts as found above, however, there can be no claim by Mr Carstens that he was unjustifiably constructively dismissed.

[32] First, the management of Seven did not conduct itself with the deliberate and dominant purpose of coercing Mr Carstens to resign. It was entitled to insist that he do the work for which he was being paid and that he should ring in each day he was absent. Second, the only breach of duty towards Mr Carstens on the basis of the facts as I have determined them is that he was not given new safety boots when he had properly requested them. This is a matter he could have taken up with the managing director, or resolved in other ways. It was certainly not a breach of duty to him of sufficient seriousness to make it reasonably foreseeable to Seven that he would not be prepared to work under the conditions prevailing. On the basis of the facts as

determined on the balance of probabilities, I therefore dismiss Mr Carstens' application.

**Costs**

[33] Costs are reserved.

**G J Wood**  
**Member of the Employment Relations Authority**