

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Jamie Craib (Applicant)
AND Windsor Doors Limited (Respondent)
REPRESENTATIVES Brian Spong for Applicant
Mordechai Henis for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 1 November 2006
DATE OF DETERMINATION 16 November 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Jamie Craib was employed by Windsor Doors Limited ("WDL") as the Production Manager – Cedar Plant, on 3 April 2006. His employment came to an end on 10 April 2006 when he was dismissed. Mr Craib says that dismissal was unjustified and seeks remedies.

[2] WDL makes and sells cedar doors and garage doors for its customers. The doors are sold at the upper end of the market. WDL says there was no dismissal, that Mr Craib was employed as a casual employee and as the parties had not been able to conclude a written employment agreement and given Mr Craib's poor performance he was no longer required for the job.

[3] I am required to scrutinise WDL's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

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.

[4] I must ascertain whether WDL carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

The beginning of the employment relationship

[5] Until 13 March 2006 Mr Craib was a Director and Shareholder of Magnum Doors 2005 Limited ("MDL"). He had extensive experience in the production of cedar doors. MDL undertook production of doors for WDL. During February 2006 he was asked by Mr Mordechai Henis, Managing Director of WDL, if he knew anyone who could manage the cedar department at WDL. Mr Henis knew Mr Craib through the work MDL did for WDL.

[6] The other directors at MDL had indicated to Mr Craib that they were intending to shift their manufacturing operation to Christchurch. Mr Craib did not want to move to Christchurch and so he offered his services to Mr Henis.

[7] On or about 28 February 2006 Mr Craib met with Mr Henis and Mr Hezi Natan (another Director for WDL). At the meeting Mr Craib says they discussed the role available in the cedar department. Mr Craib said that following that meeting he put together an employment agreement containing the terms and conditions they had discussed, which he then provided to Mr Henis.

[8] Mr Henis says that he only met Mr Craib on the day he started working (3 April 2006). I do not accept that to be the case. Mr Natan was able to recall a meeting between the three men which occurred about one month before Mr Craib commenced employment. Mr Natan could not recall whether they agreed a start date or not, but did recall a discussion about payment of a salary. Mr Henis told me that he tried three times after the first meeting to get Mr Craib to his office to discuss his contract but that Mr Craib would not return his calls. Mr Craib disputes this and says he missed one meeting, but he advised Mr Henis that he would not be there.

[9] Mr Craib told me about a further meeting which occurred on 7 March 2006. He says at this meeting it was agreed that he would commence employment on 3 April 2006. Both Mr Natan and Mr Henis do not agree with Mr Craib on this issue. They both told me and I accept, that no start date was agreed. Both Mr Natan and Mr Henis say that Mr Craib rang Mr Henis while the men were in Taiwan (they were there from 29 March to 2 April 2006) and asked if he could commence on 3 April 2006. Mr Henis agreed because there was a lot of work on and he was keen to see the back-log reduced.

[10] As a result of their absence from New Zealand, and given the haste with which a start date was agreed, the employment agreement Mr Craib had drafted was not completed. Mr Henis says that he agreed for Mr Craib to commence on a casual basis until the agreement could be completed.

The ending of the employment relationship

[11] Mr Craib worked for one week. On Monday, 10 April 2006, he was dismissed by Mr Henis who told me that Mr Craib was a casual worker, employed to work during a busy period and as he was making a lot of mistakes he would be better looking for another job. Mr Henis says Mr Craib agreed with him and asked him to pay him a weeks holiday pay. I am not satisfied that Mr Craib was employed on a casual basis. The employment agreement drafted by Mr Craib is for permanent employment.

[12] I accept the agreement was never executed by the parties, however, I have concluded that the agreement fairly sets out the basis of the employment relationship as it was discussed in February. In answer to questions at the investigation meeting Mr Henis told me that the busy period did not end on 10 April 2006. Mr Henis told me he fully intended to complete the employment agreement during the first week of Mr Craib's employment. This did not happen. Also, in early May 2006 WDL placed advertisements for a Manager for its production department. I have concluded that it was always intended that the nature of Mr Craib's employment be permanent.

[13] Mr Henis says he had 3-4 conversations with Mr Craib during the week from 3-7 April 2006. He says he would walk around the plant during the day and see how people were working. Mr Henis and Mr Natan told me Mr Craib had measured a window to the wrong length, and had labelled the cedar panels for a job, incorrectly. He told me these errors had cost the company a large amount of money in rework.

[14] Mr Craib says Mr Henis did not mention anything to him about his performance and that Mr Henis was in fact out of the office until 5 April 2006, when he arrived back from Taiwan. I have checked the immigration documents for Mr Henis and Mr Natan's arrival from Taiwan. I am satisfied that Mr Henis was back in New Zealand by 3 April 2006. I have concluded, on the balance of probabilities that it is more likely than not that Mr Henis did raise issues with Mr Craib in relation to errors he had made.

[15] On 10 April 2006 Mr Henis approached Mr Craib while he was working and asked to see him. Mr Craib says he was told by Mr Henis that they didn't need anyone to run the Cedar Department and that he was not suited to work for WDL. Mr Craib says Mr Henis said he would pay him 6% holiday pay and was given the option to work for the rest of the day or not. Mr Craib says he then spoke to Mr Spong, his representative, who advised him to seek a further one weeks pay for lack of notice.

Were the actions of the employer what a fair and reasonable employer would do?

[16] In relation to issues of poor performance a useful starting point in determining what a fair and reasonable employer would do is to consider the actions of the employer against the minimum requirements set out in *Trotter and Telecom Corp of NZ Ltd* [1993]2 ERNZ 659:

- Did the employer in fact become dissatisfied with the employee's performance of his or her duties?
- If so, did the employer inform the employee of that dissatisfaction and require the employee to achieve a higher standard of performance?
- Was the information given to the employee readily comprehensible in the sense of being an objective criticism of the work so far and an objective statement of standards requiring to be met?
- Was a reasonable time allowed for the attaining of those standards?
- Following the expiry of such a reasonable time, and following reasonable information of what was required of the employee, did the employer turn its mind fairly to the question whether the employee had achieved or substantially achieved what was expected?

[17] Mr Henis was certainly dissatisfied with Mr Craib's performance. Mr Craib denies that Mr Henis ever raised any issues regarding his performance with him. Mr Henis says he did. As set out earlier in this determination, I am satisfied Mr Craib did have errors raised with him at the time of the errors coming to Mr Henis's attention. I am also satisfied that the information provided to Mr Craib was such that Mr Craib was able to comprehend the standards he was required to meet. However, no time frames were provided for the attainment of the required standards and as a consequence the respondent never turned its mind to whether or not Mr Craib had achieved what was expected. Mr Craib had advised Mr Henis that he had not produced doors on steel frames previously. In all the circumstances a fair and reasonable employer would provide longer than one week in which to assess and form an accurate picture of a person's competence.

[18] The Court has set out the minimum requirements of procedural fairness to be applied by an employer where dismissal or warnings are contemplated:

- notice to the employee of the specific allegation of misconduct and of the likely consequence if the allegation is established;
- a real as opposed to a nominal opportunity for the employee to attempt to refute the allegation or explain or mitigate his or her conduct; and
- an unbiased consideration of the employee's explanation, free from predetermination and uninfluenced by irrelevant considerations.

(*NZ (with exceptions) Food Processing etc IUOW v Unilever NZ* [1990] 1 NZILR 35).

[19] These basic elements of procedural fairness were not met.

[20] Standing back and assessing matters objectively from the perspective of a fair and reasonable employer in these prevailing circumstances, **I conclude that WDL's actions in dismissing Mr Craib is not what a fair and reasonable employer would have done.**

Remedies

[21] Mr Craib is seeking lost wages and compensation.

[22] The process undertaken by the employer was fundamentally unfair. In cases where a fair process would unquestionably have resulted in a justifiable dismissal it will not be the actions of the respondent which is causative of any loss of remuneration (*Waitakere City Council v Ioane* [2004] 2 ERNZ 194). To decide whether a dismissal was inevitable the Authority must focus on the conduct of Mr Craib which led to his dismissal. Real difficulties arise in cases where the process is flawed to the extent that it is not possible for the [Authority] to ascertain the degree and seriousness of misconduct because this has been obscured by failures of process (*Air New Zealand Ltd v Hudson*, unreported, 30 May 2006, AC30/06, Shaw J).

[23] This is such a case. While Mr Henis told me that Mr Craib's performance caused a lot of rework, he gave me only two examples of the errors and was unable to give me any direct evidence as to the extent of costs associated with the rework. Mr Craib told me he was unfamiliar with working with certain aspects of the doors made by WDL, something Mr Craib says he told Mr Henis at the time of his employment. It is not possible to ascertain whether Mr Craib's errors and alleged lack of skills were sufficiently serious to justify the dismissal or to constitute contributory conduct.

[24] Mr Craib obtained alternative employment on 1 May 2006 albeit at a lesser salary than he had received at WDL. Mr Craib is to be recompensed for his loss of earnings for the three weeks between 10 April and 1 May 2006, being \$1,538.46.

[25] Mr Craib seeks \$12,000 as compensation. The evidence regarding the effects of the dismissal was scant, except that Mr Craib did say he was humiliated. He told me he was unable to work in the industry as Auckland door manufacturing is a very small community and he found out that Mr Henis had made comments to the effect that he was incompetent. At the investigation meeting Mr Henis accepted that he may have spoken to one person about Mr Craib. He told me the person was a close friend who had recommended Mr Craib for the position at WDL prior to his employment. I have concluded that the evidence does not satisfy the award sought by Mr Craib. The respondent is to pay Mr Craib the sum of \$3,000.

Summary of orders

Windsor Doors Limited is ordered to pay to Mr Craib \$1,538.46 reimbursement for lost wages pursuant to section 123(b) of the Employment Relations Act 2000 within 28 days of the date of this determination.

Windsor Doors Limited is ordered to pay to Mr Craib \$3,000 pursuant to section 123(1)(c) of the Employment Relations Act 2000 within 28 days of the date of this determination.

Costs

[26] Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined

Vicki Campbell
Member of Employment Relations Authority