

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Cezar Damian (Applicant)
AND Atlas Concrete Ltd (Respondent)
REPRESENTATIVES Clive Bennett, Advocate for Applicant
Garry Pollak, Counsel for Respondent
MEMBER OF AUTHORITY Dzintra King
INVESTIGATION MEETING 20 September 2004
SUBMISSIONS RECEIVED From applicant, 12 October 2004
From respondent, 21 October 2004
DATE OF DETERMINATION 07 February 2005

DETERMINATION OF THE AUTHORITY

I would like to apologise to the parties for the delay in issuing this determination. This has been due to a combination of my having taken annual leave and subsequently having an accident

The applicant, Mr Cezar Damian, says that he has been unjustifiably dismissed by the respondent, Atlas Concrete Limited. The respondent accepts it dismissed Mr Damian but says the dismissal was justified.

Mr Damian is Romanian. He has worked for Atlas Concrete since coming to New Zealand, initially in January 2002 as a batcher and dispatcher at the respondent's Kumeu Branch. Mr Damian wanted to work closer to his home and in November 2003 he became the Pod Floor Administrator in Takapuna. On 24 November 2003 an employment agreement was signed describing Mr Damian as "Financial Analyst" although the duties listed were clearly clerical and administrative duties. He was to make estimates for clients with a view to facilitating sales.

In March Mr Horanyi, the accountant, and Mr Mr Graham Collie, a director of the company, asked if he wanted to work in the administrative/accounting area. Mr Damian insisted that the jib be titled Financial Analyst and that was reluctantly agreed to although the duties were, again, not those of a Financial Analyst. Although a contract was presented it was not signed but Mr Damian undertook the duties set out in the contract.

The respondent claimed that Mr Damian had difficulties with performing the banking tasks. Mr Horanyi met with him on 18 March and discussed the problems. On 26 March Mr Horanyi and Mr Collie met with Mr Damian. Mr Horanyi showed Mr Damian a series of banking errors in cheques. He was also shown a report by a Mr Richard Caldwell, a consultant to the company, who had provided training for Mr Damian. Messrs Horanyi and Collie formed the view that Mr Damian was

unable to carry out his tasks and that there was no position for him as Financial Accountant and that he could not carry out the duties in his job description. He was told that there were vacancies as batchers and as a driver and he was offered an alternative position. He was also told that when he progressed further through his MBA and gained more experience and skills a further position might well be available, he was asked to consider this over the weekend.

On the Monday he said he would not give up the role of financial analyst and insisted on talking to one of the women who was alleged to have said that he had made mistakes. He was declined permission to do this. Mr Damian would not accept an alternative role and was told there was no longer a position for him. He was not permitted to make a phone call and was told to leave the premises. He alleges Mr Collie twisted his arm behind his back. Mr Collie agreed he had taken Mr Damian by the elbow.

It is clear that Mr Damian was dismissed on 29 March and that the dismissal was not because there was a redundancy situation as claimed by the employer but because a view had been formed that Mr Damian could not do the job. The dismissal was on performance grounds. Mr Horanyi said he did not have a position for Mr Damian because he was not capable of doing it at that time. When Mr Collie was asked why he terminated the employment he said it was because Mr Damian could not do the job in the administration office.

Mr Horanyi said that at no stage had he and Mr Damian discussed the specifics of the types of errors it was alleged Mr Damian had been making and he acknowledged that the errors had been made during the training period. It emerged during the course of the meeting that Mr Damian had himself brought a concern about cancelling cheques to Mr Horanyi. Mr Collie was unaware of this. At the time of dismissal Mr Damian had only been undertaking the tasks for about three weeks.

The performance issues were not adequately and fairly addressed, for example, Mr Damian should have been given details about the problems one of the female staff alleged she was having problems with his work. Mr Damian had only been in the job for three weeks. He had not had any warnings. The dismissal was unjustified.

Mr Damian seeks compensation and reimbursement of lost wages. I accept his evidence and that of his wife about the effect of the dismissal. The respondent is to pay Mr Damian the sum of \$4,000.00 pursuant to s.123 (1) (c) (i).

Mr Damian told me he could not accept the offer of re-employment in another position when it was made after his dismissal because he could not return to working for an employer who had manhandled him. I think the truth about this incident lies somewhere between the two accounts. It was most unwise of Mr Collie to have laid a hand on Mr Damian. Had the offer of re-employment been to the position from which Mr Damian was discharged, together with the implementation of a proper training programme, Mr Damian would have had, despite the minor altercation in the office, far less reason for declining to return than he did when the offer was that of a different position requiring different skills.

Mr Damian said he looked for other work immediately and I accept that evidence. He obtained three temporary assignments. On 9 August 2004 he obtained a full time position with a financial institution although at a lower pay rate.

Mr Pollak has submitted that as there was a three month probationary period in the contract that any recovery is limited to that. As Mr Damian did not sign the contract I do not accept this submission. The respondent is to pay Mr Damian his lost wages from the time of his dismissal until the date he

obtained the full time employment. If there is difficulty with the calculations leave is reserved to come back to the Authority.

There was no contribution by the applicant to the dismissal and there will be no reduction in the remedies.

The parties should attempt to settle the matter of costs themselves. If unable to do so they should try to agree on a timetable for the filing of memoranda; if they are unable to do, I will set a timetable.

Dzintra King
Member of Employment Relations Authority