

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 193/09
5131801

BETWEEN MARK GLASSCOCK
 Applicant

AND BELCHER INDUSTRIES
 LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Ian Davidson for Applicant
 John Schoolz for Respondent

Investigation Meeting: 24 February 2009

Further Information
Received: 5 March 2009

Submissions Received: 23 March and 6 May 2009 from Applicant
 26 March and 11 May 2009 from Respondent

Determination: 18 June 2009

DETERMINATION OF THE AUTHORITY

[1] Mr Mark Glasscock was employed by Belcher Industries Limited (BIL) as a Fitter, Turner and Welder initially on a three month contract but then permanently, from 30 June 2003 until he was dismissed on 15 February 2008. Mr Glasscock seeks various remedies and penalties for what he says, was an unjustified dismissal and a breach of good faith.

[2] BIL denies Mr Glasscock was dismissed and says Mr Glasscock resigned from his employment on 13 February 2008 after it had discussed with him matters that had affected his performance.

[3] The issues for this determination include a determination as to whether Mr Glasscock resigned or was dismissed. If I find Mr Glasscock was dismissed then I

will consider what, if any remedies he is to be awarded. I will also determine whether there has been a breach of good faith on the part of BIL.

[4] BIL has lodged a counter-claim against Mr Glasscock in the amount of \$3,791.90 being payment it says it made to Mr Glasscock for time, BIL says, he did not work.

Was Mr Glasscock dismissed or did he resign?

[5] This whole employment relationship problem turns on a proper construction of the meeting held between Mr Glasscock and Mr Bert Fourie, Managing Director on 13 February 2008. There were no witnesses to this meeting.

[6] In November 2007 Mr Fourie had met with Mr Glasscock to discuss issues related to his performance. As a result of this meeting Mr Fourie says he issued Mr Glasscock with a verbal warning that he was at risk of losing his job if things did not improve.

[7] Mr Glasscock and Mr Fourie met again on 13 February 2008 where Mr Fourie raised with him issues about his performance and advised Mr Glasscock that employees had complained about him and no longer wished to work with him.

[8] It is common ground that Mr Fourie then advised Mr Glasscock that his options were to resign from his employment, or face disciplinary action based on the allegations raised by the employees. Mr Fourie says he made it clear at all times that if Mr Glasscock wished to resign it was his choice.

[9] Mr Fourie says it was only after Mr Glasscock advised him he would resign that he then offered to pay Mr Glasscock three weeks pay in lieu of notice and provide him with a good reference. Mr Fourie says Mr Glasscock told him he would prefer to resign and that he would go downstairs and pack up his things. Mr Glasscock denies he resigned.

[10] It was however, common ground that Mr Glasscock left Mr Fourie's office and returned about 10 minutes later. Mr Glasscock says he left and returned to his

office but was in shock and unable to begin clearing his office out. He returned to Mr Fourie's office and advised him he would come back and do it at a later time.

[11] Mr Glasscock then left the workplace. Rather than going straight home he visited with a neighbour, Mr Clayton Flight. Mr Flight told me Mr Glasscock arrived at his house and told him he had been sacked and that Mr Fourie had asked for his resignation.

[12] Mr Glasscock did not attend work on Thursday 14 February and was away sick on 15 February. It was common ground that on 15 February Mr Glasscock had a conversation with Mr Karel Fourie, Mr Fourie's brother and another manager in the business, during which Karel told him he had heard Mr Glasscock had resigned. Mr Glasscock told Karel that he should not believe everything he heard. Karel told Mr Glasscock that he if he had any issues he should discuss them with Bert.

[13] Arrangements were made for Mr Glasscock to return the company vehicle that day. When he did so, he spoke again with Karel and reiterated to him that he understood Mr Glasscock had resigned and requested the company cell phone and keys be returned. Again, Mr Glasscock told Karel not to believe everything you he had heard. Karel advised Mr Glasscock that if he had any issues he should take the issue up with Mr Fourie urgently.

[14] Karel also reported Mr Glasscock's comments to Mr Fourie. Mr Fourie arranged for a letter to be delivered to Mr Glasscock on 15 February confirming Mr Glasscock's resignation. Mr Glasscock returned to his office on Monday 18 February and removed all his personal effects. At no time did he take up Karel's advice to discuss any misunderstanding over his resignation with Mr Fourie.

[15] I am satisfied it is more likely than not that Mr Glasscock did tell Mr Fourie that he would resign, rather than face the disciplinary action which had been signalled would be required. I am supported in my conclusion by the uncontested evidence of Mr Fourie that he discussed with Mr Glasscock a three week notice period which he would not have to work. The waiving of the obligation to work out the notice period is consistent with Mr Glasscock's actions on Thursday 14 February when he did not attend work or make any contact with the office.

[16] This was not a situation in which Mr Glasscock was given an option to resign or be dismissed. Nor was he given the option to resign in the face of any certainty that he would be dismissed if he participated in the proposed disciplinary process. There was no evidence to suggest Mr Fourie had reached any conclusions on the issues he wished to discuss with Mr Glasscock in the disciplinary setting.

[17] While Mr Glasscock says he didn't intend to resign, clearly Mr Fourie understood that's what he wished to do and acted on that only after two days had elapsed and Mr Glasscock had not made any contact with him and his car, phone and keys had been returned to BIL.

[18] Mr Glasscock was encouraged by Karel to speak with his brother and clarify any misunderstandings. No satisfactory explanation was given by Mr Glasscock as to why he did not take the opportunity to discuss any misunderstandings with Mr Fourie. This was surprising given his evidence that Mr Fourie was a good boss and a friend.

[19] Mr Glasscock can not now rely on the fact that he did nothing to correct Mr Fourie's impression that he had resigned, when he took no steps to correct his impression once he became aware that Mr Fourie was acting on his understanding that he had resigned.

[20] I find Mr Glasscock was not dismissed but rather chose to resign in a situation where he did not wish to face the possibility of disciplinary action.

Breach of good faith?

[21] Pursuant to section 4 of the Employment Relations Act parties in an employment relationship have a duty of good faith toward each other. Mr Glasscock says that Mr Fourie's actions in attempting to induce his resignation by making threats that other employees would not work with him breached BIL's obligation to act in good faith. I am satisfied the information given to Mr Glasscock that other employees were refusing to work with him was not given as a threat, but rather was stated as a fact and something Mr Fourie wished to discuss with Mr Glasscock.

[22] Mr Glasscock has failed to make out his claim that BIL has acted in breach of its good faith obligations towards him.

Falsified timesheets – counter claim

[23] BIL claims Mr Glasscock over stated his claims for payment of hours worked on his timesheets. The evidence produced to the Authority by BIL is not conclusive and does not meet the required standards of proof. While this claim has therefore failed, I note here that I was somewhat cautious about accepting Mr Glasscock's oral evidence in response to the questions raised at the investigation meeting about his recording of time worked and the accuracy of his recording.

Costs

[24] Costs are reserved. Given that both parties have been similarly successful in this matter I am of a mind to let costs lie where they fall. However, I encourage the parties to resolve the matter of costs between them. If they fail to reach agreement the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority