

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Leslie John Lang (Applicant)
AND Able Homes Limited (Respondent)
REPRESENTATIVES Thomas Biss, Counsel for Applicant
Murray Broadbelt, Advocate for Respondent
MEMBER OF AUTHORITY Dzintra King
INVESTIGATION MEETING 8 May 2006
**DOCUMENTARY EVIDENCE
SUPPLIED** 19 May 2006
ORAL EVIDENCE TAKEN 14 May 2006
**SUBMISSIONS BY
RESPONDENT
ON ORAL EVIDENCE** 30 May 2006
DATE OF DETERMINATION 3 August 2006

DETERMINATION OF THE AUTHORITY

The applicant, Mr Leslie Lang, says that he has been unjustifiably dismissed by the respondent, Able Homes Ltd t/a Tri Steel Northland. The respondent says that Mr Lang abandoned his employment.

Mr Lang was employed in March 2003, initially as a second in charge of a work gang and then as foreman. In mid 2004 he was off work as a result of an accident. He was due back at work on 2 September 2004. Unbeknown to Mr Lang, Mr Grant Lightfoot, the Managing Director, had been considering restructuring parts of his business. He wanted to have a qualified carpenter heading the operational team of labourers. That meant that the executive Sales/Operations Manager's position would probably disappear and there might be an impact on the foreman's position.

In August Mr Lightfoot had begun discussions with Mr Roger Crisp, the Sales/Operations Manager. He had not started discussions with Mr Lang because Mr Lang was on ACC and he needed to ascertain what would happen with Mr Crisp's position first. Mr Lightfoot placed advertisements in the local paper for the qualified carpenter's position he was considering but received no applications. He told me he was just checking the market.

Termination of Employment

On 2 September Mr Lang arrived to begin work. Mr Lightfoot mistakenly believed that Mr Lang was not due back until 15 September and told this to Mr Lang. He said Mr Lang became angry, insisted that Mr Lightfoot was wrong and that he was fit to return to work on that day.

At 9.05am Mr Lightfoot sent a fax to Ms Sonita Waaka at the ACC Office in Whangarei. The fax reads:

I have had less turn up for work this morning, he said that you have got the dates wrong and he is to start back today. I advised les that at this stage he wasn't due back to the 15th September that you and I spoken about this yesterday. Less advised me that he will go to his doctor and get a new doctors letter allowing him to start back next Monday the 6th of September. This morning has court me on the back foot, as I will need to talk to less about his future here. I wont do this until I have another member of the staff. This way they can take notes of the meting for further problems that may arise in the future. Once I spoken to less I will advise you in writing. I would appreciate your discretion if and when you talk to less about our conversation yesterday.

Mr Lightfoot said he had discussed redundancy with Ms Waaka and did not want her to say anything to Mr Lang.

Mr Lightfoot said that Mr Lang left the office very angry saying he was going to go to ACC and sort things out. He then left the office.

At around 3pm Mr Lang returned to the office. He gave Mr Lightfoot a new medical certificate which said he was fit to work as of Monday 5 September. Mr Lightfoot said he felt quite intimidated by Mr Lang's manner and asked him to sit down.

He then sat at his desk and told Mr Lang he needed to talk about his position. He said he was sorry but his position was likely to no longer exist. Mr Lang said he was told that his position did not exist any longer. Mr Lightfoot he did not have a chance to say anything further before Mr Lang leapt up and started to abuse Mr Lightfoot. He then stormed out of the office shouting "You're a piece of work". Mr Lightfoot tried to follow him to explain the situation but Mr Lang continued to abuse him.

Mr Lang then said to Mr Lightfoot "it's a wonder that one of your workers haven't topped themselves as well." Mr Lightfoot said that was a personal attack on him (his ex-fiancée had killed herself two months before and his father six years before that. Mr Lang knew about both the deaths. Mr Lang then left the building. Mr Lightfoot said he was extremely hurt by Mr Lang's comment and did not feel able or prepared to try to discuss the situation with him again as he believed the employment relationship had been tested to a degree where he was not prepared to work with a man who could make such a remark. Mr Lightfoot said that although there have been options open for Mr Lang within the business given he had made the comment about his ex-fiancée he wanted nothing more to do with him.

Ms Jenny Mager had been an employee of the respondent's at the time of the termination of Mr Lang's employment. Ms Mager recalled Mr Lang coming into the office and saying something like "I'm afraid your job isn't available but...". Mr Lang jumped up and started shouting at Mr Lightfoot and then left the office. Mr Lightfoot followed him and then came back into the office looking shaken. Ms Mager said Mr Lightfoot was not given a chance to talk to Mr Lang about any alternatives.

Mr Crisp was also in the office at the time and heard Mr Lightfoot say the position was no longer available.

It is clear, therefore, that although Mr Lightfoot may well have intended to have discussions with Mr Lang – he said he had spoken to Ms Mager about needing a witness for his planned discussions with Mr Lang – that things did not work out as planned and Mr Lightfoot just blurted out that the position was no longer available. Mr Lang had not been told that there would be discussions about the possibility of his employment being terminated and he had no opportunity to obtain a representative. Mr Lang did not abandon his employment. There was a dismissal and the dismissal was unjustified.

Mr Lang has claimed lost wages and unspecified compensation.

Was Mr Lang's position redundant?

The job description describes him as team leader who reports to the operations manager.

Mr Lang said his flatmate, Mr Dean Lamb, the second in charge, had been offered his job and that he had been working in Mr Lang's position while he was on ACC. When Mr Lamb left Graham Major took over the position.

Mr Lightfoot said he had offered Mr Lamb the opportunity to step up into a more senior role. Mr Lamb had stepped up in an acting capacity to run the gang and Mr Major was running another gang Mr Lightfoot said Mr Lang's job was offered to Mr Lamb who then resigned two or three weeks later. After that Mr Major said he could do some of the work so they decided to trial him before stepping him up. The following year he employed a foreman who did not stay long. Mr Lamb then returned before Christmas and eventually he was brought back on in a senior role.

Mr Crisp said he had talked to Mr Lightfoot about Mr Lang's return and told him he was happy to have him back. He said the work was ongoing and Mr Lamb would have been promoted while Mr Lang was away and was effectively the leading hand. Mr Crisp said you had to have someone in charge of a project. Mr Crisp wasn't hands on and neither was Mr Lightfoot – they solved any technical problems. The gangs were generally 2 or 3 man gangs. In Mr Crisp's view the job had not ceased to exist because there had to be a leading hand.

In July Mr Lightfoot had decided that he needed to improve the quality of the operational person and that Mr Lang was not a carpenter. He wanted to improve the operational team leader's role. One of the reasons for restructuring Mr Lang's role was that they wanted someone with more formal qualification.

Mr Lightfoot said although they advertised for a qualified carpenter and ran the ad throughout August with a view to interviewing in September they were unable to find anyone. They wanted a hands on person to work in the office and onsite to take the pressure off what Mr Lightfoot was doing; they wanted someone to do plans, for example.

Mr Lang's position had not ceased to exist. While Mr Lightfoot might have wanted to restructure the position he had not done so and there was still a position for Mr Lang. It may well have been that Mr Lang's might have changed sufficiently at some future stage for it to be redundant but upon his return to work his job was still there.

Remedies

Mr Lang said he was in a difficult situation. He lived 55 to 60 minutes out of Whangarei and had no transport and had been looking for work in his own area, Oakura Bay. He had applied for a job in Paihia. He now had a car and had moved to Hikurangi to his brother's within the previous three weeks. As a result of the dismissal he had lost his girlfriend and his friendship with Mr Lamb.

Mr Lang said he had had very little interaction with people, no girlfriends and second hand clothes. His whole life had fallen apart. He had had a motorbike but couldn't afford a warrant or the registration. It had broken down over Xmas and was in bits and he was in debt. He accepted he had driven the Harley to the mediation because he did not like to drive with other people as a result of a motor accident.

Mr Lang said the loss of his job had a significant impact on him. He had been unable to find another job as he could not afford transport and could only afford to live in Hikurangi so he could not get into Whangarei for interviews. Also, he had no reference. He said he was very embarrassed by the way he was treated and had suffered from severe depression as a result. No medical evidence was produced to substantiate this claim.

Lost remuneration

Mr Lang did make some efforts to find other employment and I appreciate that he was in a difficult situation regarding transport. The respondent is to pay Mr Lang three months' salary lost as a result of the personal grievance.

Compensation

Mr Lang's distress was evident at the hearing. The respondent is to pay \$4,000 pursuant to s 123 (1) (c) (i).

Contribution

Mr Lang's angry response to being told about his termination effectively put paid to any other discussions. While the initial anger due to the upset is understandable the comments about suicide were unacceptable and, lacking any apology from Mr Lang, effectively put paid to any possibility of further discussions which might have resulted in ongoing employment for Mr Lang. Mr Lang's comment and his failure to apologise were blameworthy actions which contributed to the personal grievance. I set the level of contribution at 25% and the remedies awarded above are to be reduced by that percentage.

Costs

If the parties are unable to agree on the issue of costs the applicant should file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member of Employment Relations Authority