

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 354/09
5114052**

BETWEEN LAPWELL ROOFING LIMITED
Applicant

AND LEE BRIAN HARRIS
Respondent

Member of Authority: Leon Robinson

Representatives: Chris Patterson, Counsel for Applicant
Lee Harris in Person

Investigation Meeting: 31 July 2008

Further Information 8 and 9 June 2009 from Applicant
Received: 11 June 2009 from Respondent

Determination: 7 October 2009

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant company Lapwell Roofing Limited (“Lapwell”) undertakes roofing and waterproofing work. It particularly specialised in the installation of torch applied membrane waterproofing. Its directors are the respondent Mr Lee Brian Harris’ (“Lee Harris”) parents. Lapwell claims Lee Harris owes it various sums upon the termination of an employment relationship. Lee Harris denies he is liable to Lapwell and, by way of counter-problem, he says it owes him a share of its profits and remedies for constructive dismissal.

[2] I have noted that Lapwell abandoned its claim for orders in relation to contended restricted covenants.

[3] Lee Harris says of the relationship between the parties, that he was actually in partnership with his father Brian Harris (“Brian Harris”). Lapwell says Lee Harris was an employee. In such circumstances, and because jurisdiction rests upon such a finding, it is necessary to first determine the true nature of the relationship.

The facts

[4] Lapwell was incorporated on 10 October 1984 by Brian Harris and Kathleen Harris, Lee Harris' parents. At all material times Lee Harris held one share of Lapwell's 6,000 shares.

[5] In his prepared witness statement, Lee Harris says that following his return from overseas sometime in 1995, his parents asked him if he would join Lapwell "as a partner". He says he was offered and accepted an equal share of profits with his father. He says his parents told him he would be an equal partner and that eventually, the business would one day be his. He maintains he was consistently told by his parents that he was an equal partner. On that basis, he had no appreciation of any employment. But that position is to be contrasted with the statement in reply signed by him. In that pleading he makes an allegation that he was employed by Lapwell under unwritten terms including an annual salary of \$60,000, unlimited telephone and motor vehicles expenses and an entitlement to share equally in Lapwell's profits.

[6] Brian Harris tells the Authority his son was employed by Lapwell, but in 1997, and as the General Manager on a salary of \$600.00 per week. He says there was no written individual employment contract.

[7] Lee Harris concedes that the relationship with his father began to "sour" after January 2007. At that time, he says he took exception to his father paying his (Lee Harris') sisters' petrol expenses. He further took exception to his father gifting a company vehicle to his nephew. Lee Harris explains his father failed to appreciate the ultimate impact on profits which were shared.

[8] Mrs Kathleen Harris passed away in August 2007. Lee Harris says that his sister told him he was an employee of Lapwell and that Lapwell was owned absolutely by Brian Harris. As a consequence of his sister's statement, Lee Harris consulted his father. He says his father told him that if anything happened to him (Brian Harris), Lapwell would be split three ways between Lee Harris and his two sisters. He says that Brian Harris further informed him that he "had only one share and that [he] was a shareholder, not director or partner as [he] was originally led to

believe”. Lee Harris says this conversation occurred the day before Brian Harris left for a holiday in Thailand.

[9] Brian Harris returned from Thailand on 22 October 2007. The following day 23 October 2007, the relationship between Lee Harris and his father Brian Harris deteriorated significantly. Lee Harris says he told his father he was thinking of leaving. He said Brian Harris indicated his agreement. He says he then told his father he would form his own company and would give three weeks notice to allow for completion of the current work. He says his father then expressed doubt as to whether he (Lee Harris) could establish a new company without collateral. He says he pointed out to Brian Harris he (Lee Harris) had 50% ownership of Lapwell’s stock, retentions on various jobs and ownership of a new van. He says at that point Brian Harris then told him everything was owned by Lapwell and that he (Lee Harris) would walk away with nothing, including retentions on outstanding work.

[10] Brian Harris says that his son simply declared he was leaving with immediate effect “to set up in direct competition with Lapwell”. He says Lee Harris took several items of Lapwell property and made a one-off payment to himself of \$1,800.00 from Lapwell’s bank account. That payment is not disputed and Lee Harris says he that payment was in respect of the three weeks notice he had given. The payment was described on bank documents *Wages – Lee One time PMT*.

[11] Lee Harris says that a couple of hours later his father called him and ordered him to leave Lapwell immediately and said that three weeks notice was not necessary. Lee Harris says his father was adamant the business relationship and family relationship was at an end.

[12] Between 5.00pm and 6.00pm that same evening, Lee Harris says his father phoned him again. He says his father demanded the return of all company property, two motor vehicles, computer, fax, printer, hand tools, gas guns and other equipment. He says he was told he had been removed as a signatory from Lapwell’s bank account, that his credit card had been cancelled and that he was no longer associated with Lapwell. Lee Harris says his father told him if he did not return the company assets by 12.00noon the following day the Police would be called.

[13] The following day on 24 October 2007, Lee Harris incorporated a new company with him and his wife as equal shareholders and directors.

[14] At 7.58pm on 25 October 2007, a process server delivered a letter to Lee Harris at his home, having visited earlier that same morning. The letter was from Lapwell's lawyer dated 24 October 2007 and demanded the return of two vans, computer and printer, Cove Kinlok appraisal, company documentation, facsimile machine, mobile phone and SIM card, Shell Card, Credit card, warehouse keys, post box keys, gas bottles bitumen pot and cans and a site safe pass.

[15] Lee Harris returned the van, computer and printer, company documentation, Shell petrol card, credit card and warehouse and post box keys.

[16] At 9.28am on 27 October 2007, the process server delivered a further letter from Lapwell's lawyer dated 26 October 2007 making request for the Cove Kinlok appraisal, the facsimile machine, gas bottles, bitumen pot and cans, site safe pass and tools including gas torch.

[17] Lee Harris instructed lawyers who wrote to Lapwell's lawyer by letter dated 29 October 2007. Thereafter the lawyers corresponded but matters were not resolved to Lapwell's satisfaction and this current application was lodged.

The merits

[18] It is difficult to ascertain the precise terms of the business relationship between these parties. I have no doubt that murky situation is a result of their family relationship and a degree of accompanying casualness.

[19] I conclude the swiftness of Lapwell's actions through its lawyer's multiple demands for the return of property evidences compellingly the immediate termination of the business relationship between the parties as well as a level of accompanying acrimony. It further evidences a complete absence of any direct communication and dialogue between Lee Harris and Brian Harris.

[20] I accept that Lee Harris did give his father three weeks notice. I accept that Brian Harris accepted that three weeks notice.

[21] I also accept that Lee Harris was actually an employee. His lawyer's advice of 29 October 2007 did not challenge Lapwell's lawyer's statement in the letter of 24 October 2007 that it was understood that Lee Harris "*[had] been an employee for the company for some ten years*". The statement in reply also expressly pleads an employment and claims unjustifiable constructive dismissal. Lee Harris' wife gives evidence to the Authority that she electronically transferred her husband's "wages" each week to their personal account. As well, having heard from these witnesses, I am not persuaded that Lee Harris was not an employee. All these matters lead me to conclude that **Lee Harris was employed by Lapwell Roofing Limited and I find accordingly**. That finding establishes this Authority's jurisdiction to deal with the ensuing matters.

Lapwell's claims against Lee Harris

[22] Lapwell alleges that Lee Harris is liable to it for the cost of a computer forensic report ("the report") following an examination of a computer returned to it by Lee Harris. The forensic report dated 5 November 2007 states that "*the operating system of this computer was installed on 27 October 2007 at 1.30pm, effectively removing access to all files stored on the computer prior to this*". Lapwell in essence alleges Lee Harris deleted information on the computer. I do not accept that allegation because I accept his evidence that he returned the computer on 25 October 2007. That is corroborated too by Lapwell's lawyer's letter of 26 October 2007 which does not refer to the computer as an item not returned. Accordingly, I find Lee Harris is not liable for the claimed loss. **There will be no order that Lee Harris pay to Lapwell the cost of the forensic report.**

[23] The claim for reinstating signage is not established to my satisfaction. I am not persuaded of the allegation against Lee Harris and nor am satisfied of the estimated cost of reinstating signage. **There will be no order that Lee Harris pay to Lapwell the cost of reinstating signage.**

[24] I am not persuaded that the cost of fuel now claimed by Lapwell was incurred by Lee Harris personally. I note that Lee Harris returned vehicles to Lapwell as

requested. **There will be no order that Lee Harris pay to Lapwell the cost of petrol.**

[25] The claims for ink cartridges of \$63.00 and mobile phone charges of \$33.00 are in my view, petty, and unproved. In the particular circumstances I am not persuaded such expenses were inappropriately incurred by Lee Harris. **There will be no order that Lee Harris pay to Lapwell the cost of ink cartridges or mobile phone charges.**

[26] Finally there is a claim by Lapwell for the cost of replacing its stationery in the sum of \$330.00. I am not persuaded of this claim or the cost of replacement. **There will be no order that Lee Harris pay to Lapwell the cost of replacing stationery.**

Lee Harris' claims against Lapwell

[27] Lee Harris claims he has a personal grievance for unjustifiable constructive dismissal. This grievance appears to have been raised in Lee Harris' lawyer's letter of 29 October 2007. That claim cannot succeed because I find that Lee Harris resigned entirely of his own volition and there was no breach of duty which was causative of that resignation. He resigned to set up his own business. It is what happened after that resignation that is controversial, not the events which preceded it.

[28] Accepting as I do that Lee Harris gave three weeks notice and this was initially accepted by Brian Harris, the immediate demand for the return of property and Brian Harris' communication to Lee Harris the relationship was over, constituted a sending away or termination of employment. I find that while Brian Harris first accepted Lee Harris was given three weeks notice, he very quickly changed his mind and took immediate steps to remove Lee Harris. That is not a constructive dismissal but instead, was an actual dismissal. I rather consider Lee Harris was dismissed during his notice period.

[29] I am not aware of any issue arising as to whether such a grievance was properly raised. In that situation **I find that Lee Harris was unjustifiably dismissed during his notice period and he has a personal grievance.**

[30] I find that there was no contributory conduct on Lee Harris' part.

[31] Lee Harris commenced his own business immediately after he was dismissed. He was paid three weeks wages as notice but he was not required to work out that notice because he was dismissed. **I therefore make no award for reimbursement.**

[32] Lapwell deprived Lee Harris of three weeks employment. Lee Harris had resigned to commence his own business. I accept that he suffered hurt and humiliation, injury to his feelings, and anxiety by the way in which Brian Harris terminated the relationship and demanded the return of property. But I have no doubt that much of this trauma and resentment was by reason that it was his father who was treating him that way. I am satisfied that it was distressing for Lee Harris as an employee. I mark the wrong and the loss **in relation to the employment relationship only** as far as I am able to do by awarding Lee Harris compensation for hurt and humiliation, loss of dignity and injury to his feelings in the sum of \$1,000.00. **I order Lapwell Roofing Limited to pay to Lee Harris the sum of \$1,000.00 as compensation.**

Other claims

[33] There remain claims for holiday pay and profits under "the Parnell Contract" and "the Springhill Contract".

[34] The holiday pay claim is pleaded as 8% of annual gross salary of \$60,000 in the sum of \$4,800.00.

[35] The Parnell Contract claim is in the sum of \$45,000 and the Springhill Contract the sum of \$7,500 - \$10,000.

[36] My preliminary views are that Lee Harris is in principle entitled to payment of holiday pay as may be outstanding and to a share of the profits on the Parnell and Springhill contracts. I prefer the parties attempt to reach agreement between them on the quantum of each of these claims before formal orders are made. **I therefore direct the parties to attend mediation within 45 days of the date of this determination. If they are unable to reach agreement, leave is reserved to either party to apply to the Authority to have the quantum determined.**

The costs

[37] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Lee Harris is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Patterson is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application or submission lodged outside that timeframe without leave.

Leon Robinson
Member of Employment Relations Authority