

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 173/09  
5162467

BETWEEN                      DANNY RAYMOND LEE  
   Applicant  
  
AND                              CRAIG     JOHNSTON     t/a  
   CH JOHNSTON BUILDERS  
   Respondent

Member of Authority:     James Crichton  
  
Representatives:           Applicant in person  
   Respondent in person  
  
Investigation Meeting:     9 October 2009 at Christchurch  
  
Determination:             12 October 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant (Mr Lee) alleges that there was an agreement between himself and Mr Johnston for Mr Johnston to pay him two weeks' pay at the end of his employment. Mr Johnston denies that any such agreement was made.

[2]     Mr Lee was employed by Mr Johnston on various building projects and the employment relationship came to an end when Mr Lee was working on a job at Franz Josef Glacier on the West Coast. It seems accepted that by the time the employment came to an end, Mr Johnston's employees (including Mr Lee) were well aware that Mr Johnston's business was in difficulty as a consequence of clients not paying him.

[3]     In early March 2009, Mr Lee and other workers of Mr Johnston were deployed to the Franz Josef site for work purposes and payment of wages for Mr Lee and others was not made on due date. Mr Johnston confirmed in evidence at my investigation meeting that this was caused by cashflow difficulties and the default was remedied

within a day or so, as quickly as he was able to. However, the fact that payment of wages was late caused a response from Mr Lee and others employed by Mr Johnston. Mr Johnston's site manager told Mr Johnston immediately the wages payment was not received by the workforce that the workers had *downed tools*.

[4] Mr Lee told me at the investigation meeting that the decision to *down tools* was made to try to encourage Mr Johnston to urgently pay the workers' wages and that it was no more than a device and was not intended in any way to be definitive.

[5] However, Mr Johnston said that he had no idea at the time that Mr Lee and other workers were actually prepared to continue working and he took the information that they had *downed tools* seriously. Mr Johnston was clearly most surprised by Mr Lee's evidence at the investigation meeting that the threat to down tools was just a threat as he had assumed at the time that it was real. I accept his evidence on that point.

[6] Responding then to what he considered to be a real situation as distinct from simply a threat, Mr Johnston instructed his site manager to declare the men redundant and remove them from Franz Josef and return them to Christchurch. He did this because the Franz Josef job was the only job that he then had from a paying customer and he reasoned that if his workforce would not work for him on that job, he was unable to guarantee wages in any other location.

[7] There was a meeting back at the yard in Christchurch on 4 March 2009. There is some dispute between Mr Lee and Mr Johnston as to who took the initiative for calling the meeting, but I find as a fact that both were equally involved in the desire to discuss the matter. The meeting involved not just Mr Lee but other employees of Mr Johnston as well. The nub of Mr Lee's case is that at that meeting, Mr Johnston told Mr Lee that Mr Johnston would pay Mr Lee two weeks' wages, in effect as compensation for having taken his job. Mr Lee is adamant that there was no mention of redundancy and equally sure that when Mr Johnston made the promise to pay two weeks' money, there were no qualifications to that promise.

[8] Mr Johnston remembers the matter differently. He says that he promised to pay two weeks' redundancy *if he was legally obliged to pay redundancy*. By the time that Mr Johnston spoke to his staff at this meeting, he had already spoken to the Department of Labour's helpline and while he does not remember exactly what he

asked them, I think it most likely that he asked them whether he had any legal obligation to pay redundancy. He had also already had an initial conversation with his lawyer and again I am inclined to the view that he probably asked his lawyer whether there was a legal obligation to pay redundancy as well. After the 4 March meeting, Mr Johnston spoke again to his lawyer who he said reiterated the earlier advice.

[9] I think what is most likely to have happened is that Mr Johnston asked both the Department of Labour and the lawyer the wrong question. I think he would have asked them whether there was a legal obligation to pay redundancy and, of course, in an abstract sense, there is no such legal obligation. But the issue in the present case is not whether there is a legal obligation to pay redundancy by way of statute law, for instance, but whether there was an agreement between these two men that there would be a payment of two weeks' wages which amounted to a redundancy payment or a severance payment.

[10] When I initially spoke to the parties in a telephone conference I convened on 25 August last, I formed the view then, and remain of that view, that Mr Johnston had promised to pay Mr Lee two weeks' wages. Mr Lee is adamant that he did not hear any qualifications and it seems to me odd that Mr Johnston would have suggested a particular figure (two weeks) if there was any uncertainty in his mind about whether payments would be made or not. I asked him why he suggested two weeks (which he did not deny referring to), and he told me that one of Mr Lee's colleagues had contended that two weeks was the correct figure and so Mr Johnston says his recollection was that he said that he would pay two weeks redundancy if he was legally obliged to do so. Mr Johnston struck me as an honourable and straightforward man (as did Mr Lee for that matter), and he quickly emphasised that he felt sorry for the workers and thought that two weeks' money was in principle appropriate.

[11] At the telephone conference on 25 August 2009, Mr Johnston told me that his position was that if he was told that he owed the money, he would pay it. As I have already noted, I did indicate to Mr Johnston in the telephone discussion that I had formed the view, based on the oral evidence of both parties over the telephone, that he had promised to pay two weeks' money and therefore he should pay it, but Mr Johnston wanted the matter to be considered at a formal investigation meeting and accordingly that was set down but was not able to be dealt with until Mr Lee returned to Christchurch from the Golden Bay site where he is now working.

[12] I am drawn to the conclusion that Mr Johnston did not make clear his qualifications about payment, first by Mr Lee being adamant that he heard no such qualifications, secondly by Mr Johnston's concession that he certainly mentioned paying two weeks' money and the fact that that does not sit well with a suggestion that the whole transaction must be checked legally, and finally by the fact that Mr Johnston himself conceded that he had had similar arguments with another worker of his who was also physically present at the meeting in the yard on 4 March 2009. If, as seems likely, both Mr Lee and one of his co-workers heard the same proposal without qualification, that seems to suggest that Mr Johnston did not adequately articulate that there were conditions to the possibility of payment. That view of the matter is also supported by the fact that Mr Johnston himself acknowledged that he did mention two weeks' payment. As I have mentioned, I do not understand why Mr Johnston would have mentioned a particular sum as a payment if the whole transaction needed to be checked out.

### **Determination**

[13] As I have already made clear, I thought both parties were honourable and decent men who had generally had a good working relationship and treated each other properly and fairly. However, they now have a dispute on this issue and have been unable to resolve it by agreement. It falls to the Authority to make a decision and as I have intimated earlier in this determination, I maintain the view which I initially formed at the telephone conference that Mr Johnston has made a promise to pay Mr Lee two weeks' money and that Mr Lee had accepted that promise on its face. I am not persuaded that Mr Johnston made clear his qualifications about that payment and in particular his need to check the question of whether he was legally required to pay or not. As I say, I do not understand why he would have mentioned a particular amount if he had to subsequently ensure that the whole transaction had to be verified. Further, I am supported in that conclusion by the fact that Mr Johnston acknowledged that he had had a dispute with one of Mr Lee's co-workers on the same issue, a co-worker who had been present at the same meeting as Mr Lee on 4 March 2009.

[14] Accordingly, I conclude that Mr Johnston promised to pay Mr Lee the sum of two weeks' wages as a severance or redundancy payment, Mr Johnston having declared Mr Lee's position redundant because of his inability to keep paying wages

and that being the Authority's decision, I direct that Mr Lee is to be paid the sum of \$2,100 gross as soon as Mr Johnston is in a position to make such a payment.

[15] I accept Mr Johnston's evidence that the same reasons that caused him to declare Mr Lee's position redundant also had the effect of removing his income as well and that he is now living off his partner in reduced circumstances. However, Mr Johnston made clear that he had hopes that future work might be available and I direct that Mr Johnston is to pay Mr Lee the moneys owing as and when he is able. For Mr Lee's part, I urge him to accept a process of time payment to enable the debt to be cleared just as soon as Mr Johnston is in funds.

### **Costs**

[16] Costs are to lie where they fall.

James Crichton  
Member of the Employment Relations Authority