

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Colin Lewis (Applicant)  
**AND** Welding Engineers (NZ) Limited (Respondent)  
**REPRESENTATIVES** Dylan Marriott, Advocate for Applicant  
Peter Blackwell, Advocate for Respondent  
**MEMBER OF AUTHORITY** R A Monaghan  
**INVESTIGATION MEETING** 30 May 2005  
**SUBMISSIONS RECEIVED** 5 September 2005  
**DATE OF DETERMINATION** 18 October 2005

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] Colin Lewis says he was unjustifiably dismissed by his former employer, Welding Engineers (NZ) Limited (“Welding Engineers”). The parties differ over whether there was a dismissal by way of repudiation of the employment agreement, or whether Mr Lewis abandoned his employment.

[2] Mr Lewis also believes he is owed money by way of unpaid bonuses, and holiday pay. After viewing confidential material related to the claim for a bonus, and obtaining instructions, Mr Marriott advised that the claim in respect of unpaid bonuses would not be pursued.

**Mr Lewis’ employment**

[3] Mr Lewis was employed in a sales and marketing position, commencing in November 2002. He was one of a staff of four, including the company’s managing director Peter Blackwell.

[4] In April 2004 Mr Lewis hurt his left hand in a non work-related accident. The injury required surgery which Mr Lewis underwent on Friday 30 April 2004. On 7 May 2004 he obtained a medical certificate stating he was fit for sedentary, or administrative duties but he was not to drive and was not to use his left hand. The certificate also stated that Mr Lewis was unable to resume any duties for 6 weeks from 30 April 2004.

[5] Despite this, Mr Lewis attended work during May 2004 and carried out such duties as he could. He received earnings related compensation when he was not at work. In association with the ACC’s rehabilitation procedure an occupational health and safety assessment was carried out at Welding Engineers’ premises on or about 14 May, and resulted in a written report. The report concluded Mr Lewis was able to do at least half of his normal work tasks based at the office, but he would be unable to do any of the rest for at least another 6 weeks.

[6] Although Mr Lewis' attendance at work was in that limited capacity, Mr Blackwell was dissatisfied with his performance. Mr Blackwell considered that, even if Mr Lewis were desk-bound, he could have been substantially more productive if he had pursued sales leads Mr Blackwell believed were available to him. The relatively unpredictable nature of Mr Lewis' hours of attendance was also a concern. There was uncertainty in particular over what time of day Mr Lewis would arrive at work, and when he would leave. This was associated with his travel arrangements, and absences to attend medical appointments.

[7] Mr Lewis, too, was dissatisfied. During the previous Christmas – New Year period he had been in discussions with Mr Blackwell about the possibility of his becoming a shareholder in the business, although no agreement on that matter was ever finalised. Discussions about the terms of Mr Lewis' employment agreement were also being conducted in late 2003 and early 2004. They resulted in a salary increase for Mr Lewis, effective from February 2004, but Mr Lewis wanted to pursue the management role raised in the earlier discussions about his shareholding.

[8] Then on 20 May Mr Blackwell told Mr Lewis he was cancelling Mr Lewis' automatic salary payment. The reason he gave was that he did not know what to pay Mr Lewis because of Mr Lewis' ACC status. An arrangement was made under which Mr Lewis' salary would be paid by cheque which Mr Lewis expected to receive the next day, but did not receive until Monday 24 May.

[9] Either on Friday 21 or Monday 24 May, or both, Mr Blackwell expressed his dissatisfaction with the hours Mr Lewis was working, and a view that Mr Lewis was, in effect, playing on his ACC status and not pulling his weight. Mr Blackwell subsequently purported to take Mr Lewis out of consideration for payment of a bonus on the ground that others were doing all the work. That matter has not been raised as part of this employment relationship problem, but Mr Blackwell should be aware that the terms of the bonus provision in the parties' employment agreement meant he had no right to do that. Whatever he might consider to be the merits of the matter, if he had acted unilaterally on that intention he would have been in breach of the agreement.

[10] A meeting conducted on 24 May 2004 included discussion of the kind just set out, but Mr Lewis also presented Mr Blackwell with a letter summarising his concerns. The letter expressed Mr Lewis' disappointment that he had not taken up the management role he believed he had been promised, as well as with Mr Blackwell's apparent failure to appreciate his efforts to work that month when he had not been given medical clearance to do so. He also sought a new written employment agreement, and details of holiday pay, sick pay and 'ACC leave' taken to date. According to a diary note Mr Lewis prepared on or about that time:

"I requested full adherence to my letter, he said to let him know in advance before I come back. I said I would discuss with my ACC and Doctors as to a return to work. I asked if he wanted me for 4 hours per day if that was the ACC decision. He replied (sic) he will think about it."

[11] On the morning of Wednesday 26 May Messrs Blackwell and Lewis had a heated discussion about Mr Lewis' employment agreement. Mr Lewis still wanted a new written agreement. According to a diary note Mr Lewis made of that conversation, Mr Blackwell's response was to become angry and accuse Mr Lewis of being interested only in 'what's in it for me'. He went on to say he would give Mr Lewis an agreement to suit a 'one armed person' and to make adverse comment about Mr Lewis' performance. Mr Blackwell denied Mr Lewis' account, but Mr Blackwell's overall attitude to Mr Lewis' performance at the time leads me to conclude Mr Lewis' account is probably true.

[12] Mr Lewis began feeling ill, and said he could not work under those conditions. He told Mr Blackwell he was leaving for the day. As he put it in his diary note:

“I said I can not work in these conditions and was leaving for the day. Peter said I have left before and he wanted to know what my intentions were. I clearly said I was going to get advice before I committed to anything. Peter requested my keys back which I had to get him to take of (sic) my key ring. I left then went back for my lunch bag. Peter was yelling to the other staff “He’s left again”.”

[13] Mr Lewis left the premises and consulted his doctor. According to his diary, he told another Welding Engineers staff member that he was feeling bad ‘after a fight with Peter’ and was going to the doctor’s. That afternoon he sent Mr Blackwell a fax saying he had left the office that morning because of the stress he was feeling, and attached a medical certificate which merely recorded that he would be unable to attend work from 26 May to 7 June 2004 inclusive. It seems Mr Lewis’ doctor advised the ACC separately that Mr Lewis was not to work for a further four weeks because of his injury, and Mr Lewis continued to receive earnings-related compensation. Mr Blackwell was also advised of that ongoing absence.

[14] In response to Mr Lewis’ 26 May fax, on 27 May Mr Blackwell sent an email message to Mr Lewis asking that he be more descriptive, and saying he did not understand Mr Lewis’ position. In a note dated 2 June 2004, Mr Lewis’ advocate advised Mr Blackwell that Mr Lewis had an employment problem, and details would follow in due course. I do not accept that this communication was sufficient to alert Mr Blackwell to the nature of Mr Lewis’ problem, let alone give any indication of what might be done about it.

[15] Over the same few days, Mr Blackwell sought the return of Mr Lewis’ company vehicle, and someone from Welding Engineers told Mr Lewis he had heard Mr Lewis had handed in his notice.

[16] The next contact between Mr Blackwell and Mr Lewis took the form of a lengthy letter from Mr Marriott dated 22 June 2004. The letter summarised the parties’ disagreements during 2004, then said Mr Lewis believed Mr Blackwell’s actions on 26 May 2004 amounted to a repudiation of the employment agreement. The repudiatory actions were said to be Mr Blackwell’s: refusal to pay Mr Lewis’ wages; humiliating Mr Lewis in the workplace in front of others; removing his keys; and failing to return his car.

[17] As far as Mr Blackwell was concerned, until receipt of that letter the available information about Mr Lewis’ intentions amounted to a medical certificate from Mr Lewis saying he would be off work together with advice from the ACC of a further four week absence. Mr Blackwell wrote a letter to Mr Lewis dated 30 June 2004, expressing surprise about the claims in the 22 June letter and asking Mr Lewis to confirm his position. Then the letter said:

“It appears to me that you have abandoned your employment as I understood you were off work on ACC until approximately mid-June but I have not heard from you since, other than Mr Marriott’s list of claims.

As you are obviously not returning to your job we should settle matters and go forward as quickly as possible.”

[18] The parties were unable to ‘settle matters’ and Mr Lewis did not return to work at Welding Engineers.

### **The existence of a dismissal**

[19] Mr Lewis did not return to work because he took the position that his employment agreement had been repudiated. He had conveyed that position to Mr Blackwell by 30 June 2004. The real question for determination is not one of whether he abandoned his employment, rather of the correctness of his view that Mr Blackwell had repudiated the employment agreement.

[20] On the evidence I heard, I do not believe addressing this employment relationship problem with reference to whether the acts described in [16] above were repudiatory of the employment

agreement - and Mr Lewis treated them as such - fully reflects the nature of the problem. From the evidence, the real problem lay in Mr Blackwell's uncertainty about when Mr Lewis would be working and dissatisfaction with Mr Lewis' work on the one hand, and Mr Lewis' dissatisfaction with Mr Blackwell's treatment of his management aspirations and his attempts to work during May on the other. Those factors led to escalating ill-feeling, arguments, and Mr Lewis' departure on 26 May.

[21] If this analysis is wrong, I comment on the allegedly repudiatory acts as follows:

- (a) Refusal to pay wages. This is a reference to the cancellation of the automatic payment on 20 May. Often a refusal to pay wages is a repudiatory act, but here Mr Blackwell sought to address Mr Lewis' variable hours of work and concurrent receipt of earnings-related compensation. He wanted to make a manual payment. Mr Lewis knew that. At the time the ACC was even seeking to recover an overpayment brought about by Mr Lewis' continuing to be paid by Welding Engineers. While Mr Blackwell handled the matter heavy handedly, his action was not repudiatory.
- (b) Humiliating Mr Lewis in front of others. This is a reference to the incident recorded in the diary note from which I quoted at [12]. Although it was unwise I do not regard Mr Blackwell's comment as repudiatory. It reflected his attitude to the uncertain nature of Mr Lewis' attendances at work.
- (c) Removing Mr Lewis' keys. Nothing in the evidence about the discussion of 26 May indicates Mr Lewis himself saw that action as repudiatory of the employment agreement. It occurred in the context of ongoing uncertainty on Mr Blackwell's part about when and at what time Mr Lewis would be reporting for work, and after Mr Lewis said he was leaving for the day. I do not regard it as repudiatory.
- (d) Failing to return the car. A company vehicle was made available to Mr Lewis so he could visit customers. Only limited private use was available. Mr Lewis' injury meant he had been unable to drive during May, and there was no indication he would be able to drive in the near future. There was no reason for him to retain the vehicle in those circumstances and Mr Blackwell was entitled to take it. There was no reason for Mr Blackwell to return it until Mr Lewis was at work and able to drive it.

[22] Overall I do not believe those acts are sufficiently serious to amount to repudiatory acts, whether cumulatively or separately.

[23] The basis for the repudiation was expanded on in one respect during the investigation meeting when Mr Lewis said in his written brief of evidence: "I believe I was dismissed when PB reneged on his earlier agreement increasing my responsibilities and then removing the benefits of my agreement from me due to my physical injury." Mr Lewis further discussed his view that Mr Blackwell was reneging on earlier promises during oral evidence.

[24] Some misconceptions underlay that view. First, the prospect of Mr Lewis' taking on a general management role had been raised in association with the prospect of his obtaining a shareholding. These matters were being discussed together and in the context of Mr Blackwell's wish to ease himself out of the day-to-day management of the business. Mr Blackwell did not act on that wish – nor was he obliged to in the absence of any concluded agreement to that effect – and the proposal did not go ahead. Mr Lewis was not entitled to attempt to force the matter as he did.

[25] Secondly, I do not accept that the pay rise Mr Lewis received, with effect from February 2004, was intended to be accompanied by an increase in Mr Lewis' management responsibilities. Mr Blackwell was still attending to day-to-day management himself. His offer of a pay rise was not accompanied by any offer of an increase in responsibility. It was nothing more than a pay rise.

[26] Thirdly, Mr Lewis made much of the fact that his employment agreement had expired and he required a new one. If the requirement was associated with his view that he was entitled to a new, managerial position, then there was no agreement to that effect and no need for a new written employment agreement. If the requirement was based on an understanding of the terms of the existing agreement, the relevant terms are so flawed in law it is difficult to give any effect to them. However I do not believe they obliged Welding Engineers to provide Mr Lewis with a new written employment agreement for a position that, in essence, was continuing as before.

[27] As for the argument on 26 May, the abusive way Mr Blackwell spoke to Mr Lewis was unacceptable. However Mr Lewis has not made any direct statement to the effect that conduct itself led him to believe the employment relationship was over. The argument angered and upset Mr Lewis to the extent he left the office, but he did not say that behaviour amounted to a dismissal.

[28] The nature of the evidence led me to ask Mr Lewis to specify when and why he concluded his employment was over, especially as the provision of medical certificates immediately after the argument of 26 May indicated the relationship was continuing as far as he was concerned. He said he was not intending his employment to continue, but he did not know if he had that intention when he left the premises on 26 May because he was confused and stressed at the time.

[29] All of this supports my view that Mr Lewis went home angry and upset on 26 May, then turned his mind to what he would do about his ongoing employment. He was already dissatisfied with the lack of a new written employment agreement or any confirmation that he would take the wider management role he sought, and the argument on 26 May could well have been the last straw. Obviously after Mr Lewis left the premises on 26 May he reached a conclusion about whether his employment should continue. He decided he did not wish it to do so, but I am not persuaded the alleged acts of repudiation were any more than hooks on which to hang his decision on the matter.

[30] In general I regard the circumstances of the termination of Mr Lewis' employment as similar to others in which an employee leaves a workplace, never to return, after a disagreement with the employer. Mr Lewis' wish for a new employment agreement and management role did not involve a breach of the employment agreement on Mr Blackwell's part. Despite Mr Blackwell's conduct during the 26 May argument leaving something to be desired, it was not said to be repudiatory other than with reference to the acts described in [16]. I do not believe it was sufficient to base a finding that Mr Lewis was dismissed.

[31] Accordingly I conclude Mr Lewis was not dismissed. He does not have a personal grievance.

### **Holiday pay**

[32] Under the parties' employment agreement, Mr Lewis was entitled to 15 days' annual leave per year. According to Mr Blackwell's calculation, over the period of his employment Mr Lewis accumulated an entitlement to 22.5 days' leave. Mr Blackwell says 16.5 of those days were taken, leaving an outstanding entitlement of 6 days.

[33] Of the 16.5 days allegedly taken, I accept Mr Lewis took 5 days inclusive of absences on 2 September and 20 November 2003. The remaining 11.5 days relate to Mr Lewis' absences following his injury in late April 2004. Mr Blackwell applied annual leave to those absences. He says he did so by agreement with Mr Lewis. Mr Lewis denies there was such an agreement.

[34] In support, Mr Blackwell relied on a printout of notes he had made on a white board during what he said was the relevant conversation. The printout recorded merely:

“Holiday = 26 - [illegible, but probably ‘30 April’] 5 day  
ACC = 3<sup>rd</sup> x [illegible] 7<sup>th</sup> x ½ day”

[35] I accept the parties had a discussion about how Mr Lewis’ absences would be treated, but the note is very cryptic and does not cover the entire 11.5 days. I do not accept it as evidence of the agreement Mr Blackwell says the parties reached. I suspect, too, that it reflects the general confusion in early May about whether Mr Lewis was off work or not, and whether Welding Engineers or the ACC had responsibility for paying him.

#### 1. The first week’s absence following injury

[36] Mr Lewis received 5 days’ pay from Welding Engineers for the period April 26 – 30, although he did not report for work. The company’s wage record also showed an unexplained payment in respect of a half day on Sunday 2 May. Appropriately, since Mr Lewis’ accident was not work-related, there were no payments of earnings-related compensation for April 26 -30.

[37] At the time, Mr Lewis had an outstanding entitlement to sick leave of about 5 days. Section 306 of the Injury Prevention, Rehabilitation and Compensation Act 2001, as amended by Schedule 3 of the Holidays Act 2003, provides:

“(1) If an employee suffers a personal injury that is not a work-related personal injury ... and the employee is incapacitated, the employee may elect to take any unused sick leave entitlement that the employee may have under subpart 4 of Part 2 of the Holidays Act 2003 and use it in respect of an equivalent part of the first week of incapacity.

(2) This section applies to avoid doubt.”

[38] There is no corresponding provision regarding the application of unused annual leave.

[39] The Holidays Act itself provides entitlements to sick leave when an employee is sick or injured. It permits the use of sick leave when an employee already on annual leave becomes sick or injured (s 36), but does not make general provision for an employee taking or needing sick leave to use annual leave for the purpose. It does, however, provide at s 39 that a sick or injured employee whose sick leave entitlement has been exhausted may, by agreement, use annual leave.

[40] The effect of these provisions is that the first 5 days of Mr Lewis’ absence could not be taken as paid annual leave when an unused entitlement to sick leave was available. The printout on which Mr Blackwell relied indicates that Mr Blackwell at least sought to set the absence off against Mr Lewis’ annual leave, but if Mr Lewis agreed to this he was giving away an entitlement in respect of the way his leave was to be applied. Section 6 of the Holidays Act provides that entitlements under the Act are minimum entitlements so that, while they may be enhanced by agreement, they cannot be reduced or excluded. I therefore conclude Mr Lewis’ absence should have been treated as paid sick leave, and he is entitled be credited with 5 days’ annual leave in respect of that period.

#### 2. Subsequent absences

[41] By 3 May Mr Lewis had effectively exhausted his entitlement to sick leave, but received payment for subsequent absences from Welding Engineers.

[42] According to Mr Blackwell’s most recent note, Mr Lewis was absent for ½ days on each of 2, 3, 5 and 7 May, and for full (or near full) days on 24, 26, 27 and 28 May. There was no material dispute about that. Mr Lewis was paid for those days as if he had taken leave, but records he provided show he also received earnings-related compensation, albeit at an abated rate, when he was absent from Welding Engineers. The total number of days when Mr Lewis was absent from Welding Engineers in May, but was paid by it, is 6.

[43] While I am doubtful about whether there was an agreement that those absences be treated as annual leave, I do not believe that Mr Lewis was treated as being on some form of paid leave, contrary to his knowledge or wishes. I am not prepared to order that Mr Lewis be paid twice by Welding Engineers in respect of the absences.

[44] In summary Mr Lewis is entitled to holiday pay as follows:

- (a) for the 6 days which Mr Blackwell acknowledged were outstanding; and
- (b) of the 11.5 days attributable to Mr Lewis' accident, for -
  - . 5 days in respect of the period 26 – 30 April 2004, on the ground that those days should have been treated as paid sick leave; and
  - . a further .5 day which is unaccounted for -  
being a further 5.5 days.

[45] If payment for the 6 days referred to in (a) above has been received, then I make no further order in respect of it and Welding Engineers is to make only the payment referred to in (b) above. Otherwise it is ordered to make payment in respect of (a) and (b).

### **Costs**

[46] Costs are reserved. The parties are invited to reach agreement on the matter. If they are unable to do so they may file in the Authority, and must copy to each other, memoranda setting out their positions on costs.

**R A Monaghan**  
**Member, Employment Relations Authority**