

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 361/08
5113598

BETWEEN BRIAN LOMAS
 Applicant

AND INTER ALLIANCE
 CONSTRUCTION LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: David Collins for Applicant
 Tom Skinner for Respondent

Investigation Meeting: 24 April 2008

Determination: 21 October 2008

DETERMINATION OF THE AUTHORITY

[1] Brian Lomas says he learnt while off work after an accident that Inter Alliance Construction Limited considered it no longer employed him. The information came from an Accident Compensation Corporation officer who had contacted Inter Alliance. Mr Lomas says this news amounted to an unjustified dismissal. He seeks remedies of lost wages and distress compensation.

[2] Prior to the investigation meeting Inter Alliance had provided no statement in reply. It did instruct a representative to attend the meeting after an application for postponement of the investigation was declined. Inter Alliance – through the representative – denied Mr Lomas was dismissed or treated unfairly.

No postponement

[3] At the start of the investigation meeting I declined an application, by Mr Skinner on Inter Alliance's behalf, for the meeting to be postponed. Inter Alliance

wanted the opportunity to arrange for evidence from some suggested witnesses who, on the day of the investigation meeting, were either sick or in Australia.

[4] Courier records show the statement of problem was served on 23 January 2008 at the registered office of Inter Alliance at that time. The address was for a firm of accountants. Subsequent enquiries to that firm by an officer of the Authority in February confirmed that Inter Alliance was its client, that the statement of problem had been received, and that the documents had been sent on to Inter Alliance. Further efforts were also made to get contact telephone numbers for representatives of Inter Alliance without success.

[5] Notices of investigation meeting were also sent to the registered office of Inter Alliance – which had changed by 1 April – and to its accountant’s address which remained an address for records on the Companies Office register.

[6] Inter Alliance did receive the notice at least seven clear days before the 24 April investigation meeting. This was confirmed in an email from its office administrator on 16 April seeking postponement of the investigation. The email advised that there were difficulties knowing when Inter Alliance’s director Boris Sepulveda would be in New Zealand and that he was away for the “*coming week*”. Mr Skinner told me on 24 April that Mr Sepulveda was in New Zealand until 23 April but had to fly back to Sydney.

[7] Inter Alliance had adequate opportunity to prepare a response to the claim by Mr Lomas. It failed to take that opportunity and I have proceeded to investigate and determine his claim in the absence of any substantive reply or evidence from Inter Alliance.

Employment of Mr Lomas

[8] I accept Mr Lomas’ evidence that he was employed by Inter Alliance in late August 2007 to work as a hammer hand. There was no written employment agreement. He was to be paid \$18 an hour and work on a project building houses in the Ruakaka area.

[9] The arrangement was made by Ray Canton who was acting as an agent of Inter Alliance.

[10] Bank records supplied by Mr Lomas show payments made to him on 6 and 14 September 2007 with the reference “*Sepulveda Bor Ruakaka*”. Mr Lomas says these were payments of wages to him from Inter Alliance.

[11] At work on 10 September Mr Lomas fell while climbing the framing of a house under construction. A medical certificate issued later that day confirms he suffered an injury to his forearm. The injury was initially diagnosed as a sprain. A later x-ray identified a fracture and Mr Lomas spent some weeks wearing a cast.

[12] That evening Mr Lomas spoke by telephone with Mr Canton. He told Mr Canton he could be off work for up to six weeks due to the injury. He asked if Mr Canton wanted to see the medical certificates but was told to keep them.

[13] ACC accepted the injury as an accident. Mr Lomas was still receiving earnings-related compensation from ACC at the time of the investigation meeting.

Termination of employment

[14] On 17 September 2007 an ACC officer told Mr Lomas that Inter Alliance denied he was employed by the company at the time of the accident.

[15] ACC gave Mr Lomas a copy of an ACC Employee Earnings Certificate bearing a facsimile machine date stamp, name and number for Inter Alliance. It was dated 15 September 2007. It includes a note saying that Mr Lomas was “*under trial*” and that Mr Canton had been told to “*terminate*” the trial. A question on the form asks where the employee had a permanent employment contract. A box marked ‘*No*’ is ticked.

[16] This was news to Mr Lomas. He promptly spoke by telephone by Mr Canton who told Mr Lomas to disregard those comments but that he should take time to first recover from his injury.

[17] In late October an ACC officer told Mr Lomas that Inter Alliance had again denied he was employed. He was told that Inter Alliance would not agree to a work assessment to arrange light duties as a part of a return to work because he had no job with the company.

[18] In the same week Inter Alliance ran a small job advertisement in a local newspaper for a carpenter for permanent work in the Ruakaka area. It was the same as the advertisement that Mr Lomas had answered before he was employed in August.

[19] Georgina Burgess, an employment advocate then acting for Mr Lomas, raised a personal grievance by letter and spoke to Mr Sepuldeva twice during November 2007. Her evidence, affirmed and taken by telephone during the investigation meeting, was that Mr Sepuldeva undertook in both conversations to respond to the grievance through his lawyer. No response was received and the matter was lodged in the Authority on 22 January 2008.

Determination

[20] The actions of Inter Alliance in denying Mr Lomas was employed by it at the date of his accident on 10 September 2007 amount to a termination of his employment. It was not what a fair and reasonable employer would have done in all the circumstances at the time. It was an unjustified dismissal.

[21] Even if Mr Lomas had been employed on a 'trail period', which he denies was ever agreed, there had been no discussion about bringing that period to an end. Such a probationary period would also be ineffective under s67 of the Employment Relations Act 2000 ('the Act') because it was not specified in a written employment agreement.

[22] Neither is there any evidence that Mr Lomas' work was unsatisfactory or that there was any other reason for which he could justifiably have been dismissed. Even if there were such a reason, it had not been fairly put to Mr Lomas with an opportunity to respond.

[23] Mr Lomas has a personal grievance and is entitled to remedies.

Remedies

[24] Mr Lomas is not entitled to lost wages for the period he was paid ACC earnings-related compensation – that is from a fortnight after his accident until the investigation meeting. Neither is he entitled to claim as lost wages, the 20 per cent difference between what might have been earned and the 80 per cent of earnings paid under the ACC entitlement. Having received the ACC entitlement, Mr Lomas cannot say he was fit for work and would otherwise have earned full wages in that period.¹ Neither, allowing for the contingencies of life, can I say that Mr Lomas would have been working for Inter Alliance more than six months after his dismissal.

[25] However Inter Alliance did not pay him 80 per cent of his wages for the first week of his incapacity before the ACC earnings-related compensation began. It should have paid him that amount as an entitlement under s97 of the Injury Prevention, Rehabilitation, and Compensation Act 2001. Under s99 of that Act, Mr Lomas may now recover that amount as arrears of wages. He is awarded \$684 (being 80 per cent of what he would have earned for a 45-hour week at \$18 an hour) as wage arrears for the first week of his incapacity. Added to that is interest of \$35.00 on those wages for the period from 17 September 2007 to the date of the investigation meeting (clause 11 of Schedule 2 of the Act applied).

[26] Mr Lomas gave evidence of sleeplessness and anxiety arising from the circumstances of his dismissal. He is entitled to compensation for the humiliation, injury to feelings and loss of dignity arising from Inter Alliance's actions in ending his employment in the way that it did. This does not include compensation for the effects of his accident which are addressed by the entitlements of the ACC scheme.

[27] Having regard to the particular circumstances of this matter, and the general range of awards in cases of this type, I set \$3500 as compensation under s123(1)(c)(i) of the Act.

[28] The remedies are to be paid within 28 days of the date of this determination.

¹ See *Watt v RD Managh Limited t/a Odin's Marine* (unreported, ERA, AA 123A/06, 1 November 2006, Member Urlich) at [8]-[9].

[29] None of the remedies awarded are to be reduced under s124 of the Act. There is no evidence that any actions of Mr Lomas contributed in a blameworthy matter to the situation giving rise to his grievance.

Costs

[30] Mr Lomas is entitled to a reasonable contribution to his costs in bringing this claim. Applying the principles discussed in *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 to this matter heard in half a day with two brief witness statements and oral submissions, costs of \$1000 are awarded.

[31] Inter Alliance is also to reimburse Mr Lomas for the \$70 fee paid to lodge this matter in the Authority.

Summary of outcome

[32] Mr Lomas was unjustifiably dismissed by Inter Alliance.

[33] Within 28 days of the date of this determination, Inter Alliance is to pay the following sums in remedies and costs to Mr Lomas:

- (i) \$684.00 in wage arrears for the first week of incapacity following the accident; and
- (ii) \$35.00 as interest on that amount; and
- (iii) \$3500.00 as compensation under s123(1)(c)(i) of the Act; and
- (iv) \$1000.00 as a contribution to Mr Lomas costs; and
- (v) \$70.00 in reimbursement of his lodgement fee in the Authority.

Robin Arthur
Member of the Employment Relations Authority