

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Daniel Oborn (Applicant)  
**AND** Plumbco Limited (Respondent)  
**REPRESENTATIVES** Kerry Amodeo, Counsel for Applicant  
Jason Lally, Advocate for Respondent  
**MEMBER OF AUTHORITY** R A Monaghan  
**INVESTIGATION MEETING** 20 April and 4 May 2006  
**SUBMISSIONS RECEIVED** 8 and 15 May 2006  
**DATE OF DETERMINATION** 26 May 2006

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] Plumbco Limited (“Plumbco”) employed Daniel Oborn as a tradesman, and subsequently a foreman, on construction sites where it had contracts. Mr Oborn says it unjustifiably demoted him from the foreman’s position, and unjustifiably and constructively dismissed him in association with the demotion. Mr Oborn also says he is entitled to payment of a bonus, and seeks that payment.

**Mr Oborn’s employment**

1. The foreman’s position

[2] Mr Oborn is a qualified plumber, gas fitter and drainlayer. Plumbco employed him as a tradesman plumber commencing in February 2005 on an agreed rate of pay of \$23 per hour.

[3] At the time, Plumbco was working on major contracts at 188 and 208 Hobson St in Auckland City. Mr Oborn worked at 188 Hobson St for the first several months of his employment.

[4] Plumbco’s managing director, Jason Lally, believed Mr Oborn was working well on the site. The site itself had been running well too, and the contract was nearing its end. Because of this, although Mr Oborn is a young man and had no experience as a foreman, Mr Lally planned for Mr Oborn to take charge of the site. Another foreman would assist Mr Oborn to develop a foreman’s skills.

[5] Accordingly in or about July 2005 Mr Lally called into the 188 Hobson St site and spoke to Mr Oborn. He told Mr Oborn he would like to see Mr Oborn move into a foreman’s position, and asked if Mr Oborn was interested. He also explained the responsibilities of the position, and that

there would be an increase in pay to \$25 per hour. Mr Lally's evidence was that he told Mr Oborn a company van and cellphone would also be available, while Mr Oborn said he was told he would be 'entitled' to a van and cellphone. Mr Oborn believed he was ready to take on such a position, and accepted it.

[6] There was a conflict in the evidence concerning whether Mr Oborn was ever provided with a written employment agreement. Mr Lally said Mr Oborn was sent an agreement to sign, but never returned it. Mr Oborn denied this. It is at least clear that the arrangements for Mr Oborn's promotion to foreman were not reduced to writing. However I record that Plumbco's house rules were annexed to the agreement said to be Mr Oborn's, and they made the following provision regarding company vehicles:

"Vehicles are allocated at the Director's discretion, and may, at any time be re-allocated to another person."

[7] Mr Lally's evidence was that the above was the company's policy on the provision of vehicles to staff members. They were usually made available to foremen.

## 2. The bonus

[8] There is a dispute about whether, during the July 2005 conversation, Mr Lally also offered Mr Oborn access to a bonus payment in respect of his foreman's duties. Mr Oborn insisted he was told he would receive a share of the bonus to which the foreman at 188 Hobson St was entitled, while Mr Lally denied that was the case.

[9] Plumbco practice was that bonuses were offered individually to eligible staff on a contract or site by site basis, and confirmed in writing. Plumbco had entered into a written agreement with the foreman at 188 Hobson St to the effect that the foreman would receive a bonus, with the bonus being calculated with reference to a percentage of the total contract price for the site. The actual amount to be paid was assessable after the completion of the work and took into account performance. The directors reserved the right to remove the bonus at any time for lack of performance.

[10] The written agreement with the foreman also provided:

"The Bonus may be allocated to another person if you where (sic) absent during that period or may be allocated to another member of staff if your duties to supervise that project are no longer required."

[11] Mr Lally said that, by the time the position of foreman at 188 Hobson St was offered to Mr Oborn, the contract price for the work remaining was very small. On the figures I was given, about 1/8<sup>th</sup> of the contract price remained. In those circumstances Mr Lally did not believe there was any point in offering a bonus to Mr Oborn, hence he did not do so.

[12] I deal with this part of the employment relationship problem by saying I am not persuaded Mr Lally offered Mr Oborn a bonus in respect of his foreman's position. I consider it likely that Mr Oborn had a general understanding that foremen received bonuses, and assumed or expected that he would be entitled to one as well. His assumption firmed when he became aware of the discretion to allocate a foreman's bonus to another person, although that was part of the agreement between the foreman and Plumbco and did not itself confer any entitlement on Mr Oborn. Given the discretionary nature of the bonus arrangement overall, as well as the facts that the relevant contract was close to completion and Mr Lally was being offered his first position as foreman, I consider it unlikely that Mr Lally would make the offer Mr Oborn said he did. I accept Mr Lally's evidence.

[13] The claim to a bonus payment is therefore dismissed.

## 2. The demotion and termination of employment

[14] By about November 2005 the work at 188 Hobson St had been completed to the point where Mr Lally sought to move Mr Oborn to the 208 Hobson St site. Mr Oborn could not go to the site as foreman, as there was already a foreman on-site. Mr Oborn moved to the site and worked as a tradesman (or went 'back on the tools'), without any drop in pay and without being required to return the van and cellphone he had been allocated. He said he was happy to do that, but expected he would then be transferred onto his next contract as site foreman.

[15] However there was no evidence Mr Lally gave any indication of where Mr Oborn would be working after the completion of the Hobson St sites, or in what capacity. At least in part that is because Plumbco employed a number of foremen, and did not always have contracts for an equivalent or greater number of sites. Hence if there were fewer sites than foremen, inevitably some foremen would be working 'on the tools' - without any reduction in pay - just as Mr Oborn was doing at 208 Hobson St. A realistic expectation would be for transfer to the next site as foreman provided a suitable site was available. Mr Oborn could not necessarily expect to be transferred to his next site as foreman ahead of a more experienced foreman, especially if the site was large and complex and the experienced foreman would be forced to work on the tools.

[16] In or about October 2005 Lloyd Hallett commenced employment as general manager at Plumbco, although Mr Lally maintained an active management role. On or about 18 November 2005 Mr Lally asked Mr Hallett to arrange a meeting with Mr Oborn, intending to discuss matters including certain incidents at 208 Hobson St as well as where Mr Oborn would work after the 208 Hobson St contract ended.

[17] On the morning of 18 November Mr Hallett telephoned Mr Oborn to ask him to attend a meeting. According to Mr Hallett, he asked Mr Oborn to come in for a meeting to 'talk about some changes' or to 'talk about the future of the company and where we want you to work'. Mr Oborn asked 'what is this about' and pressed repeatedly for further details of what was to be discussed at the meeting. He gave Mr Hallett the impression that he was reluctant to attend unless he had those details.

[18] Mr Oborn was adamant there was no talk of a meeting, and that Mr Hallett simply asked him to return the van and cellphone and told him his rate of pay would be reduced to \$23 per hour. When he asked 'what is this about', Mr Hallett told him there had been a decision that he was to 'go back on the tools' and that he no longer qualified for these benefits. Mr Oborn said he was speechless, and was unable to answer when Mr Hallett asked him when he could return the van and cellphone. Because of Mr Oborn's inability to answer, Mr Hallett asked him to call back with a time.

[19] Mr Hallett admitted telling Mr Oborn he should return the van and cellphone, but said he did so in the course of the discussion about attendance at a meeting, in an attempt to encourage Mr Oborn to attend the meeting. Mr Lally accepted that he would probably have sought the return of the van and cellphone during the meeting, but said that was in reliance on company policy and because they were needed elsewhere. I did not find Mr Hallett's explanation very convincing, and consider it likely that he raised the return of the van and cellphone because he was aware of Mr Lally's intentions in that respect. Indeed I consider it probable he allowed himself to be drawn into conversation with Mr Oborn about the possible conduct of the meeting more than he should have given that Mr Lally had asked him only to arrange the meeting. Mr Hallett also admitted offering to drive Mr Oborn home, telling Mr Oborn he would do so after the meeting.

[20] Mr Hallett denied telling Mr Oborn his rate of pay would be reduced, and Mr Lally's evidence was that he had no intention of reducing Mr Oborn's pay. Mr Hallett also denied telling Mr Oborn he was 'back on the tools' during the 18 November conversation. He believed he referred to that matter during another conversation, with reference to work at 208 Hobson St.

[21] Mr Oborn was so upset after his conversation with Mr Hallett that he left the work site. Mr Hallett tried to contact him again but was unable to do so.

[22] Mr Oborn said in his written brief of evidence that he did not return Mr Hallett's calls or try to contact him, but later that day he telephoned Mr Lally. He said he asked Mr Lally why he was being demoted, and that Mr Lally's response was hesitant. Mr Lally said nothing about a meeting. However in evidence Mr Lally denied speaking to Mr Oborn at all until Mr Oborn came to his office at about 3 pm. Instead, Mr Hallett's evidence was that he had two brief conversations with Mr Oborn when Mr Oborn telephoned him.

[23] Telephone records for Mr Oborn's company cellphone showed that two calls were made to Mr Hallett's number, but none to Mr Lally's. Mr Oborn could not explain this. He could only suggest that Mr Lally spoke to him when he called Mr Hallett's number, or that he made another call to Mr Lally using some other telephone. The former is not consistent with his statement that he did not return Mr Hallett's calls, and the latter was speculative and unlikely.

[24] I consider it more likely than not that Mr Oborn spoke to Mr Hallett, not to Mr Lally. Mr Hallett's evidence was that the conversations amounted to little more than an indication that Mr Oborn would attend the office at 3 pm that afternoon. I would be prepared to accept that Mr Oborn was upset and spoke of demotion, and Mr Hallett did not know how to respond. However I do not accept that Mr Hallett expressly confirmed there was a demotion. His purpose was to obtain Mr Oborn's agreement to attend a meeting, and to arrange a time for the meeting.

[25] As to the remainder of the conversations about what might be discussed in the meeting, Mr Oborn should have attended the meeting and ascertained Mr Lally's intentions from Mr Lally himself rather than trying to press Mr Hallett for an account of them, before deciding what his response would be.

[26] Nevertheless as a result of his conversations with Mr Hallett Mr Oborn took the view that he had been demoted from the foreman's position, and decided he had no option but to resign. He prepared a letter of resignation, which he handed to Mr Lally without discussion at or about 3 pm.

[27] The letter read:

"Your actions in unilaterally varying my employment agreement by stripping me of my position as Foreman and demanding the return of my cellphone and van and relegating me to that of a leading hand are unlawful and give me no option but to resign from my employment with Plumbco."

[28] Immediately on delivering the letter, Mr Oborn left Mr Lally's office. By letter of the same date, Mr Hallett asked Mr Oborn to contact him to discuss the resignation. Mr Oborn's solicitor replied on Mr Oborn's behalf in a letter dated 22 November 2005, raising Mr Oborn's personal grievance on the ground of constructive dismissal.

[29] Mr Oborn's solicitor met with Messrs Lally and Hallett on 23 November. Messrs Lally and Hallett gave their version of Mr Oborn's appointment to the foreman's position and his performance in it. The meeting ended with the solicitor agreeing to seek Mr Oborn's comments on Plumbco's position as put to him. By letter also dated 23 November 2005, the solicitor later advised that Mr

Oborn rejected the company's account and that proceedings would be commenced in the Employment Relations Authority.

### **Unjustifiable demotion**

[30] This matter turns on the credibility of the witnesses. Despite his negative view of, and defensive response to the meeting of 23 November, I found Mr Lally to be credible. Mr Oborn's evidence - while genuine - suffered from a tendency to make assumptions that were not well-founded, and present them as assertions of fact. I have set out some examples in my findings of fact, and there were others I have not recorded because the subject matter did not bear directly on whether or not Mr Oborn was demoted. No doubt Mr Oborn believes in the truth of his statements, but I found them based on no more than assumption too often to be completely reliable.

[31] As for Mr Hallett, I accept that he sought to do no more on the morning of 18 November than arrange a meeting. I also accept that Mr Oborn was insistent in pressing him about the reasons for the meeting, and consider it likely Mr Hallett did not respond to Mr Oborn's questioning as well as he could have. However I do not accept that Mr Hallett told Mr Oborn he was going back on the tools, or that he was being demoted. Regarding the prospect of Mr Oborn's wages being reduced, I am not persuaded to the standard of the balance of probabilities that Mr Hallett said there would be a reduction, as opposed to Mr Oborn making an assumption that would be the case. In any event, even if there was to be a reduction, Mr Oborn should have awaited confirmation of that from Mr Lally before acting.

[32] It is not possible to say what, if anything, would have been made of Plumbco's concerns about Mr Oborn's performance if the meeting Mr Lally sought had gone ahead on 18 November. Nor is it possible to say what Mr Oborn would have been told about his future, or whether he would have had a personal grievance as a result. Mr Oborn sought to force the matter through Mr Hallett, and I believe he formed the conclusions he did precipitately and prematurely. He should have met with Mr Lally as he was asked to. He was not demoted during the conversations with Mr Hallett.

[33] Accordingly I do not accept that Plumbco has affected Mr Oborn's terms and conditions of employment by an unjustifiable action.

### **Unjustified dismissal**

[34] For the same reasons, I find Mr Oborn's resignation was premature. It did not amount to a constructive dismissal.

### **Costs**

[35] Costs are reserved.

[36] The parties are invited to reach agreement on the matter. If they seek a determination from the Authority they are to file and serve statements setting out what (if any) award of costs should be made, and why, within 28 days of the date of this determination.

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