

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 402/09  
5155608

BETWEEN COLIN PRINCE  
Applicant

AND COLLINS LAWSON LIMITED  
Respondent

Member of Authority: James Crichton

Representatives: Mark Nutsford, Advocate for Applicant  
Paul Collins, Advocate for Respondent

Investigation Meeting: 23 September 2009 at Auckland

Determination: 13 November 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant (Mr Prince) alleges that he was unjustifiably dismissed from his position with the respondent (Kitchen Studio). That claim is resisted by Kitchen Studio.

[2] Mr Prince was employed as Warehouse Co-ordinator and worked in that role prior to the respondent purchasing the business effective 8 October 2007. It is common ground that Mr Prince had an existing back injury at the time the ownership of the business changed. It is accepted that Mr Prince had some time off as a consequence of that back injury and Mr Prince was also on light duties for much of that period.

[3] By the middle of 2008 it was clear that the various alternatives to surgery on Mr Prince's spine were not addressing the fundamental problem and a surgical operation was arranged for 8 August 2008.

[4] Mr Prince says that he kept the employer advised of his progress post operatively and while Kitchen Studio accept that that was the case generally, there is dispute about the nature and extent of that reporting. Initially it seems that a return to work date of 29 September was contemplated but it became clear that that date was optimistic. Kitchen Studio acknowledged they received a communication from Mr Prince around this date indicating a return to work was still perhaps two weeks away, and then on 16 October 2008 Mr Prince reported by email on his prognosis. That email contained detailed discussion of his significant back pain (and the apparent reasons for it) and concludes with the observation: *I therefore have no idea when I will be able to return to work ...* .

[5] Mr Prince said in his brief of evidence that the pain in his back *eased considerably* on Sunday October 19th and by the following Tuesday had *nearly gone*. He went on in his brief of evidence to allege that he went into Kitchen Studio to see the Directors (Mr and Mrs Collins) on 24 October but they were not in the office that day and so he returned, he says, on 28 October 2008 to meet with them and report progress.

[6] Those dates are all contested by Kitchen Studio and in the result, Mr Prince had to resile from his written brief of evidence in his oral testimony before the Authority. Mr Prince said when he called on 24 October Mr and Mrs Collins were present (although they are adamant they were not) and Mr Prince spoke to a woman he did not know at reception and that he left no message. Mrs Collins and Mr Collins were mystified by the suggestion that there would be somebody at reception Mr Prince did not know as the firm was small and he had not been away all that long and they had not recruited any new staff while he had been away.

[7] Furthermore and most significantly, Mr Prince's contention that he spoke with Mr and Mrs Collins on 28 October 2008 is simply not right because Mr and Mrs Collins satisfied me (and eventually Mr Prince as well) that they were at a funeral in New Plymouth on that date.

[8] I am satisfied then that the discussion between Mr Prince and Mr and Mrs Collins took place not on 28 October as Mr Prince originally contended but on the date which Mr and Mrs Collins say the meeting took place, namely 3 November 2008. There is significant dispute between the parties about what happened at that meeting

and indeed the focal point of my investigation was to decide whose recollection of the events of that day was to be preferred.

[9] Mr and Mrs Collins say that Mr Prince presented at the workplace without an appointment, that he was *still in obvious discomfort* and that *he advised us that he ... would be unable to resume duties as either the Warehouse Co-Ordinator or even on the warehouse light duties that he had been working on from October 2007. He advised that the risk of aggravating his back was too high, that his surgeon had advised that if any further corrective surgery was required it would be significantly more painful and rehabilitation more lengthy than what he had already suffered. ...*

[10] Mr Collins then deposed that Mr Prince asked if there were any other roles that he could perform in the business and was told that there were none and that Mr Prince then reiterated that he was unable to do his own job. Mr Collins says that he specifically asked Mr Prince *are you saying that you are ending our employment relationship?* and Mr Prince said *yes I guess I am.* Both Mr and Mrs Collins were adamant that the initiative for the end of the employment relationship came from Mr Prince.

[11] Mr Prince saw matters differently. His evidence was that he gave Mr Collins a copy of a letter from his surgeon dated 7 October the thrust of which was that once he was free of pain, Mr Prince could return to work. Mr Prince remembers the letter being at least produced or discussed but he denies receiving the letter at that point. Mr Prince alleges that after some general exchanges, Mr Collins ... *explained that it may be best for me if they laid me off.* That contention is hotly denied by Mr Collins and by Mrs Collins.

[12] There are then a series of email exchanges between Mr Prince and Kitchen Studio, principally directed at the provision of a reference for Mr Prince. Mr Collins acknowledged that he was embarrassed that he had not attended to the reference request as promptly as he ought to have. By email dated 20 December 2008, Mr Prince reminded Mr Collins of the request for a reference and in that email he also asked ... *would it be possible to get something in it (the reference) to say I was laid off?* Mr Collins evidence was that he was *concerned* about this request because he regarded it as untruthful and in the result, no reference was ever provided. Mr Prince confirmed to me during my investigation meeting that he would not have filed his proceedings had the reference been provided as he had requested.

[13] A personal grievance was raised on 17 January 2009 by Mr Prince's advocate and both Mr and Mrs Collins describe how *stunned* and *devastated* they were to receive that communication.

### **Issues**

[14] The only issue of any significance in this matter is what happened at the meeting on Monday 3 November 2008. Mr Prince says that he presented at the meeting with a medical certificate giving him a clearance to return to work and Mr and Mrs Collins says that they commenced the same meeting believing they would be agreeing the basis for Mr Prince to return to his duties after surgery, only to be saddened and disappointed by Mr Prince's information that he was not going to be fit to resume those duties.

### **What happened at the meeting?**

[15] There are two distinct and diametrically opposed views about what happened at the meeting on 3 November 2008. Mr Prince said that he went along to arrange to restart his employment and that he took along a medical certificate to demonstrate that was possible, while Mr and Mrs Collins say they engaged with Mr Prince expecting arrangements for a return to work but instead being confronted with Mr Prince being adamant that he was unable to contemplate a return to his former duties. Both parties struck me as emotionally engaged in the dispute and both seemed significantly distressed by the others' behaviour. Mr and Mrs Collins described being *devastated* by the receipt of Mr Prince's personal grievance and spoke of the extent to which they had gone to try to look after Mr Prince during his employment and his lengthy period of ill health as a consequence of his back injury.

[16] Conversely, Mr Prince seemed disgruntled about the fact that Mr and Mrs Collins did not contact him as often as he thought was proper after his surgery and he wanted to minimise the efforts that Mr and Mrs Collins had gone to to support him over the period that he had been unwell.

[17] The Authority can derive some assistance from the surrounding events, the evidence of secondary witnesses and the email traffic between the parties around the time of the fateful meeting. In the end however, the Authority must chose a version of the meeting which makes the most logical sense and the surrounding evidence can only be a guide to that outcome.

[18] I note first of all that Mr Prince's written brief of evidence was, in a number of significant respects wrong about dates. While that in itself is not significant, when issues of creditability are involved the Authority is entitled to take into account evidence to be given on oath with a degree of certainty which proves to be ill founded. In particular, I note that Mr Prince said in his written brief that he went to see Mr and Mrs Collins on 24 October and they were not in the office (evidence which Mr and Mrs Collins deny because they say they were in the office on that day) and that Mr Prince went back to Kitchen Studio on 28 October when he says he met with Mr and Mrs Collins (a day when I am satisfied Mr and Mrs Collins certainly were not in the office) and Mr Prince wanted to commence work that day because his first week would only be four days, 27 October being Labour Day.

[19] I made it clear during the investigation meeting that I was particularly troubled by Mr Prince's evidence on this point. At para.11 of his written brief he says that he returned to talk to Mr and Mrs Collins on 28 October 2008. In the very next paragraph he has this to say:

*As the 27th (of October 2008) was Labour Day I thought it would be good to return to work on the 28th thus the first week would only be four days allowing me to get used to it slowly. I told them I would need to be careful until I received full clearance but could still work as I had done before and asked if they wanted me to start 'tomorrow or next week'.*

[20] None of that makes any sense. First in para.11 Mr Prince's is claiming that he spoke to Mr and Mrs Collins on 28 October then in the following paragraph that I have just quoted in its entirety, the implication is that he had this supposed discussion on Labour Day itself the 27th of October otherwise the phrase at the end of the paragraph asking Mr and Mrs Collins if they wanted him to start *tomorrow or next week* made little sense. Furthermore, the suggestion that Mr Prince would benefit from a four day working week seems difficult to square with the prospect that Mr Prince was in fact meeting with the employer potentially on the first of those four days and in circumstances where he had given the employer no warning about his wish to meet with them and his possible return to work.

[21] As I made clear at the investigation meeting, I found this evidence of Mr Prince frankly quite unbelievable and it was not difficult to convince Mr Prince that he has his dates completely wrong and the meeting that he referred to actually

took place the following week on 3 November 2008. Were it simply about a confusion as to dates that would be one thing, but Mr Prince makes a specific point of saying that he wanted to return to work in a short week so that he could get used to working again. Plainly that evidence anyway is nonsense given the revelation that the meeting did not take place when Mr Prince said it did but fully a week later.

[22] Next there is the business about the Doctor's certificate. We know what the Doctor's certificate said because the certificate is before the Authority. In effect the certificate stated that once Mr Prince was free of pain he could return to working normally. However, until he was pain free, the certificate made clear that Mr Prince could not lift more than 10 kgs and was to avoid bending. But even on Mr Prince's own evidence, the medical certificate was written as it were in advance because his Doctor was going to be away overseas for a month and Mr Prince says that he wanted something that he could give to the employer before the Doctor got back from his overseas trip. Mr Prince says that he went to the meeting (which we now know took place on 3 November 2008) with this medical certificate and that he gave it to Mr Collins. Of course he says the purpose of his attending at the office with the medical certificate was to assure the employer that he was able to return to work and that his Doctor had cleared him to do so. But that evidence is clouded somewhat by the fact that Mr Collins is very clear that he did not receive the medical certificate at the meeting and even if he had, the certificate is equivocal.

[23] Mr Collins agrees that Mr Prince talked about the medical certificate but he is adamant that he did not receive it at the time and did not see it until subsequently when the proceedings issued. I accept Mr Collins evidence on that point and I must say that of the two men, I much preferred Mr Collins evidence to that of Mr Prince. Mr Collins struck me as straightforward and truthful and I thought his evidence was generally supported by the surrounding circumstance and the corroboration of his wife's evidence. The fact that the medical certificate was not received by Mr Collins at the time of the meeting seems to me to remove the alleged benefit which Mr Prince seeks to obtain by reliance on the medical certificate.

[24] What is more, the medical certificate, even at its most persuasive, runs absolutely counter to Mr Prince's own contemporaneous email of 16 October 2008 just nine days after the date of the medical certificate confirming he had *no idea when I will be able to return to work*. Clearly then, Mr Collins' mind set at the meeting on

3 November must have been influenced by Mr Prince's earlier email. Certainly his evidence before the Authority suggested the email had quite an effect on him and given that I have accepted Mr Collins did not actually see and read the medical certificate at the time of the meeting on 3 November, the effect of that medical certificate which Mr Prince seeks to rely upon is simply not made out.

[25] I have already described the two different version on what is supposed to have happened in the meeting and I do not propose to repeat that material. However, what happened afterwards is relevant. Mr Prince emerged from the meeting and spoke with Ms Graham who was at the relevant time the showroom consultant at Kitchen Studio. It is clear from the evidence that Mr Prince and Ms Graham were on friendly terms. Ms Graham describes that Mr Prince turned up at the workplace on 3 November *quite jovial, excited at the thought of getting back to work* but then when the meeting finished he was she said, *stunned*. Ms Graham told me that Mr Prince had said words to the effect that he would not be working there anymore as *Karen and Paul (Mr and Mrs Collins) had told me that I won't be able to carry out my duties and it would be better if I left*. Mrs Prince also gave evidence of her husband having told her that he had been laid off. Of course, neither Ms Graham nor Mrs Prince were present at the meeting with Mr and Mrs Collins and their only source of information is Mr Prince himself.

[26] What is interesting about the evidence of Ms Graham and Mrs Prince relying as it does on what Mr Prince told them, is that that evidence is not entirely consistent with Mr Prince's own emails. Subsequent to the termination of the employment, Mr Prince sought to obtain a reference from Mr Collins and there was a unreasonable delay in the provision of that reference which Mr Collins properly acknowledges. In an email to Mr Collins dated December 20, 2008, Mr Prince asks for his termination of employment to be treated as a lay off. It is difficult to read that email without reaching the conviction that Mr Prince knew perfectly well that the nature of the termination of his employment was not in fact a lay off at all. If it had been laid off, why would he ask specifically for the reference to refer to him being laid off? I conclude that he was asking for the reference to refer to him being laid off because that would assist him in obtaining benefit assistance from Work and Income New Zealand not because that in fact was what happened.

[27] In an email to Ms Graham dated 4 November 2008 (that is the day after the meeting) Mr Prince denied that it was his idea to leave the workplace but did confirm his own medical advice that he was not to lift over 10kg or bend fully and he then goes on to say that he had no option but that maybe it's for the best. Then, in another email from Mr Prince to Ms Graham dated 18 November 2008 he claims to be virtually pain free, says he has been looking for other work, that he has not heard anything from Paul (Mr Collins) [presumably a comment on the reference] and that he might still officially be employed by Kitchen Studio.

[28] The Authority heard evidence from Mr van Kuyk who was at the relevant time a kitchen installer for Kitchen Studio. Mr van Kuyk clearly was on good terms with both Mr Prince and with Mr and Mrs Collins and spoke to both of them about the end of the employment relationship. In particular, I was struck by Mr van Kuyk's evidence that when he spoke to Mr Prince about the end of the employment relationship, he described Mr Prince's as being *quite calm* about the end of the relationship and when he asked Mr Prince if it was a mutual decision, Mr Prince said *sort of*.

[29] In the end, while the surrounding evidence assists to some extent the Authority must express a preference for which recollection of events is to be preferred. I have reached the conclusion that Mr Collins recollection of the events of the meeting of 3 November is to be preferred over that of Mr Prince. It is clear from the evidence before the Authority that Mr and Mrs Collins had no warning that Mr Prince was proposing to show up on the day he did. Furthermore, there is no evidence at all to suggest that Mr and Mrs Collins were keen to get rid of Mr Prince. Indeed the evidence is the other way. All of the evidence supports the conclusion that Mr and Mrs Collins were anxious for Mr Prince to return to his duties and I accept their evidence that when the meeting commenced, their expectation was that they would be talking about a return to work at some point in the future.

[30] It seems to me inconsistent with the other evidence that Mr and Mrs Collins would decide at the 3 November meeting to push Mr Prince out. They had been patient up until that point and they had no particular reason I find to decide that they could not tolerate a continuation of the status quo, which was that Mr Prince was not available to fulfil his obligations. It seems to me more rather than less likely that it was Mr Prince who initiated the severing of the employment relationship by

indicating that he was unable to perform his duties at the point at which the meeting took place and would continue to be in that position for the foreseeable future. Mr and Mrs Collins had no information on which to make a decision about Mr Prince's future other than from Mr Prince himself. Their only source of information prior to the meeting was Mr Prince's various emails, and in particular the email dated 16 October 2008. That email painted a bleak picture of Mr Prince's prognosis. However, it was not inconsistent with the medical certificate dated 7 October 2008 which Mr Prince claims to have provided to Mr Collins, but which I am satisfied Mr Collins never saw until the proceedings were on foot.

[31] I accept Mr Collins oral evidence on that point but I note that his oral evidence is supported by the email exchange that Mr Collins undertook with Mr Nutsford, the advocate for Mr Prince, when Mr Nutsford was endeavouring to negotiate some sort of settlement of the matter. The email traffic from that period makes clear that Kitchen Studio had not seen the medical certificate. In an email from Mr Collins to Mr Nutsford dated 12 February 2009, Mr Collins says this:

*At no time were we presented with or given a medical clearance for a return. We had asked for this. I note that even as late as 20 December, we received a note from Colin (Mr Prince) that said he was going to get final clearance in mid February 2009 at his six month check.*

[32] Mr Nutsford then replies to Mr Collins and obviously supplies the two medical certificates, the first dated 7 October 2008 and the second dated 13 February 2009. As to the latter, it clears Mr Prince to *return to full active duties*. The former dated 7 October 2008 makes clear that Mr Prince was not to lift weights of more than 10kg and was to avoid *full flexion (that is bending)*. While I am satisfied that Mr Collins did not see the 7 October 2008 medical certificate at the time of the meeting on 3 November 2008, even if he had, it would hardly have been supportive of a return to work in a role as a warehouse supervisor. The evidence is clear that for all the period that Mr Prince was employed by Kitchen Studio, he was effectively working light duties and being actively supported by others in the business (including Mr Collins himself) because he was unable to attend to the full range of duties that the job required.

[33] If, as the evidence makes clear, Mr Prince presented at the meeting on 3 November in pain (which is what Mr and Mrs Collins both say and I accept) and

Mr Collins had already received Mr Prince's email of 16 October referring to that considerable pain and Mr Prince may perhaps have referred to the medical advice contained in the certificate of 7 October 2008, it seems to be more likely than not that Mr Prince initiated a discussion about his future which simply had the effect of him withdrawing his services, because he felt he did not want to compromise the integrity of the surgery he had recently undergone and did not want to risk the possibility that he would further damage his weakened spinal structure.

[34] I am simply not persuaded on the evidence before me that Mr or Mrs Collins took any steps at all to assert or encourage Mr Prince to bring the employment relationship to an end. Indeed, I think the evidence discloses that it was Mr Prince who took the initiative for entirely sensible reasons but that he became disgruntled when he could not get a reference from Mr Collins and he subsequently decided to bring these proceedings. Certainly, Mr Prince confirmed to me at the investigation meeting that the reason that he brought the claim was because Mr Collins had been dilatory in forwarding the reference which he had earlier promised and that seems to me to confirm my view of the evidence. Had Mr Collins produced the reference in a timely way, Mr Prince would have been satisfied with the outcome. That suggests to me that Mr Prince felt in control of the outcome, at least to some extent, until the reference was not forthcoming at which point his position changed.

[35] I do not think there is any evidence at all that Mr and Mrs Collins sought Mr Prince's dismissal or connived that in anyway.

### **Determination**

[36] My conclusion is that Mr Prince was not dismissed from his employment but that he chose to indicate to his employer Kitchen Studio that he could not then, nor in the foreseeable future, fulfil his obligations because of the continuing weakness of his repaired spine.

[37] It follows that Mr Prince's claim fails in its entirety.

### **Costs**

[38] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority