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Raman v Landmarx Development (NZ) Limited (Auckland) [2007] NZERA 63 (5 March 2007)

Determination Number: AA 59/07 File Number: AEA 1/06

Under the [Employment Relations Act 2000](#)

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND OFFICE

BETWEEN Shri Raman (Applicant)

AND Landmarx Development (NZ) Limited (Respondent)

REPRESENTATIVES Aaron Kashyap, Counsel for Applicant

Shailendra Kewal, Advocate for Respondent

MEMBER OF AUTHORITY Vicki Campbell **INVESTIGATION MEETING** 18 January 2007 **DATE OF DETERMINATION** 5 March 2007

DETERMINATION OF THE AUTHORITY **Employment Relationship Problem**

[1] Mr Shri Raman was employed by Landmarx Development (NZ) Limited (LDL) on 23 December 2002 and was subject to a written employment agreement. As a senior carpenter Mr Raman undertook all aspects of carpentry work for LDL including, foundation work for new buildings, fencing, and general building work. Mr Raman says he was unjustifiably dismissed from his position as a senior carpenter on 29 March 2005. Mr Raman believes he was dismissed from his job as a result of his age.

[2] LDL develops and markets residential houses. LDL says Mr Raman had a number of performance issues raised with him throughout his employment including a failure on his part to attend meetings as required to address these performance issues. LDL says Mr Raman failed to attend a performance appraisal meeting on 24 March 2005 in contradiction of a specific instruction given to him. His failure to attend this meeting resulted in his dismissal for serious misconduct.

[3] I am required to scrutinise the LDL's actions in accordance with the statutory test of justification set out at [section 103A](#) of the [Employment Relations Act](#). The section states:

For the purposes of [section 103\(1\)\(a\)](#) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions,

and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[4] I must ascertain whether LDL carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

Discrimination

[5] Mr Raman claims his employment was terminated due to his age, in contravention of the Human Rights Act 1992. He says he was dismissed in order to allow the company to employ a younger worker. Mr Raman has failed to provide any evidence to support his claim of discrimination either in his written statement or at the investigation meeting. I asked several specific questions of Mr Raman in relation to this claim but did not receive any satisfactory answers. I am not satisfied that Mr Raman has been subject to discrimination in his employment with LDL.

Lawful and reasonable instruction

[6] LDL says it dismissed Mr Raman for failure to adhere to a lawful and reasonable instruction to attend a performance appraisal meeting on 24 March 2005.

[7] For an instruction to be lawful it must not be illegal, be within the scope of the agreement, and must not demand the performance of any impossible or dangerous task (*Wellington etc Clerical etc Workers IUOW v College Group Limited* [1984] ACJ 315).

[8] Mr Raman was told on 23 March 2005 that he was to attend a meeting the following day on 24 March 2005 at 2.00pm. Unbeknown to Mr Kewal, Mr Raman had sought and been given approval by his immediate supervisor to take time off work to attend his lawyer's office in the afternoon of 24 March 2005. Mr Raman had purchased a property and needed to attend to the signing of documents and other legal issues associated with the purchase.

[9] When Mr Raman did not turn up to the meeting, Mr Kewal decided to dismiss him. Mr Kewal says the requirement for Mr Raman to attend the meeting was a lawful and reasonable instruction which had not been adhered to by Mr Raman. The dismissal occurred on 29 March

2005. This was the next working day after Mr Raman's failure to attend the meeting on 24 March as the Easter weekend period of 25th to 28th March 2005 intervened.

[10] An instruction to attend a disciplinary meeting certainly meets the tests of a lawful and reasonable instruction, and I am satisfied Mr Raman did not attend. However, I must be satisfied that what LDL did and how it acted were actions consistent with the actions of a fair and reasonable employer. At the investigation meeting Mr Anirudh Munsami, LDL's operations manager, told me he didn't seek an explanation from Mr Raman for his failure to attend the meeting, as he didn't see why he should. He told me he believed it was Mr Raman's obligation to advise why he was unavailable.

[11] The employer was duty bound to investigate Mr Raman's non-attendance at the meeting on 24 March 2005, before it made any decisions to dismiss him. Mr Munsami did not carry out any form of investigation into the reasons for Mr Raman's failure to attend the meeting on 24 March. Had he done so, he would have discovered that Mr Raman was away from the worksite legitimately, with his supervisor's permission.

[12] I find nothing in the evidence to suggest Mr Raman had refused to attend the meeting on 24 March 2005. Rather he had an alternative engagement which he had received permission to attend. A fair and reasonable employer would not have dismissed Mr Raman for failing to follow a lawful and reasonable instruction in those circumstances.

[13] Mr Raman has a personal grievance for unjustified dismissal and is entitled to remedies.

Remedies

Lost wages

[14] Mr Raman has the obligation in the first instance to mitigate his lost income following a dismissal. At the investigation meeting Mr Raman told me he suffered a work related injury in December 2004. As a result of this injury Mr Raman had surgery on 23 May 2005. Mr Raman told me that when he was dismissed at the end of March, and because of the surgery was planned for May he decided not to look for alternative employment. He told me he did not start work until September 2005 but only lasted there for two weeks as he experienced pain in his heel and was not able to work after that. He provided no evidence as to the efforts he has made to find alternative employment following the operation in May and commencing employment in September.

[15] I am satisfied Mr Raman is entitled to an award of three months lost wages as a result of his dismissal in the sum of \$7,203.30 gross (being 13 weeks at the average rate of \$554.10 - this is the rate advised to Accident Compensation Corporation by the company as being gross wages for the four weeks immediately prior to Mr Raman's dismissal).

Landmarx Development (NZ) Limited is ordered to pay to Mr Raman \$7,203.30 pursuant to [section 123\(1\)\(b\)](#) of the [Employment Relations Act 2000](#), within 28 days of the date of this determination.

Compensation

[16] I accept that Mr Raman would have been upset by his dismissal, however, the evidence at the investigation meeting relating to hurt and humiliation was scant. For that reason any award under this heading should be at the lower end of the scale.

Contribution

[17] I am bound by section 124 of the Act to consider the extent to which Mr Raman's actions contributed towards the situation that gave rise to his personal grievance and if those actions so require, to reduce the remedies that would otherwise

have been awarded accordingly.

[18] I am not satisfied that it is just to reduce the remedies awarded to Mr Raman. While the respondent may have had issues relating to his performance, he was not dismissed for poor performance, but rather for not attending a meeting. I have found he had a reasonable explanation for his non-attendance. I am therefore satisfied that Mr Raman has not contributed to the actions giving rise to his personal grievance.

Landmarx Development (NZ) Limited is ordered to pay to Mr Raman \$2,500 pursuant to [section 123\(1\)\(c\) of the Employment Relations Act 2000](#), within 28 days of the date of this determination.

Costs

[19] Costs are reserved. The parties are encouraged to discuss and resolve the matter of costs between them. In the event that they are unable to do so they may lodge and serve memorandum in the Authority for consideration.

Vicki Campbell
Member of Employment Relations Authority

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