

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Pita Riwhi (Applicant)  
**AND** Stewart Lewis trading as Lewis Construction (Respondent)  
**REPRESENTATIVES** Jamie Bahlman, Counsel for Applicant  
No appearance for Respondent  
**MEMBER OF AUTHORITY** Paul Montgomery  
**INVESTIGATION MEETING** 27 July 2005  
**DATE OF DETERMINATION** 29 August 2005

DETERMINATION OF THE AUTHORITY

***Employment relationship problem***

[1] The applicant was employed by the respondent as an engineering labourer beginning on 26 April 2004. He says he was not offered an employment agreement nor was he given a job description. He was given and signed a document headed *Job Description*. It appears to be a document which sets out issues such as hourly rate, bonus payment, trial period, travel, accommodation and meal allowances. It also covers holiday pay and sick leave and a required notice period of one week.

[2] On Tuesday, 14 September 2004 the applicant admits he had incorrectly drilled a roof sheet of iron, placing the drilled holes as if it was a wall sheet. Mr Riwhi says Mr Lewis then told him he *had to let him go* because the applicant had made a succession of mistakes. The applicant left the building site. He says that the only complaint made to him previously by Mr Lewis was about his work rate.

[3] The respondent has failed to respond to attempts by the Authority's support officers to contact him.

[4] Unable to elicit a response from Mr Lewis using the courier's *proof of delivery* process, the support officer engaged the services of Baycorp to ensure personal delivery of the Authority's notice of direction, notice of investigation meeting, a copy of the application lodged with the Authority and a booklet entitled *Going to the Employment Relations Authority*.

[5] On 1 August 2005 the Authority received confirmation that these items had been personally served on Mr Lewis and an affidavit signed by a Mr Roger William Lundy confirming that he had properly served the documents to a person who identified himself as Stewart Lewis. Service was effected on Tuesday 5 July 2005.

[6] In his statement of problem Mr Riwhi seeks payment of the two weeks wages owed to him plus holiday pay for the period of his employment, lost wages as a result of the dismissal and compensation in the sum of \$10,000.

***What caused the problem?***

[7] As indicated above, the applicant accepts he misdrilled one sheet of steel and that as a result he was dismissed from his employment, his employer citing a series of errors which remain unspecified. The applicant says he interpreted Mr Lewis's statement that he (Mr Lewis) had to *let you go*, as a dismissal. The applicant says he left the site promptly.

[8] Later that day, at 6.53 pm the applicant sent Mr Lewis a text message asking if he could pick up his final pay on the Thursday. Mr Lewis sent three responses which are worth noting. The first read:

*You've got a cheek... I wont pay this week, as the roof isn't finished until next week either as there is a two week wait for the sheets you ruined ...your job description and hourly rate required due care on your part which was not forthcoming ... I explained this on several occasion .... I will consider this matter over the next weeks. Adjustments will be made accordingly.*

[9] The second response received at 7.04 pm stated:

*Threats will not be tolerated in a dispute ..... Contact WINZ or other authority specialising in work related disputes.*

[10] The final reply received at 7.06 pm read:

*Furthermore thanks for leaving me in the shit after all I did for you. You had heaps of chances to prove yourself.*

[11] The following day the applicant wrote to his former employer saying:

*I am writing this letter to let you know that what happened yesterday was not a resignation but an attempt to calm down after the argument we had following my dismissal. This letter is also a request for the reasons for my dismissal which I would like in writing.*

[12] Attempts by the applicant's solicitors to resolve the matter between the parties fell on deaf ears and the parties were unable to resolve the matter in mediation.

***The investigation meeting***

[13] The meeting was brief. I heard from the applicant and from his partner Sarnya Edwards who spoke of the negative effects Mr Riwhi suffered following his dismissal.

[14] I was satisfied prior to the beginning of the meeting that Mr Lewis had received the appropriate notices regarding the meeting and had, for his own reasons, decided not to attend. I therefore have to evaluate the evidence put before the Authority without the benefit of the respondent's input.

### ***The issues***

[15] The Authority need to determine the following issues:

- Was Mr Riwhi dismissed by Mr Lewis?;
- What was the reason for the dismissal?;
- Was Mr Lewis entitled to withhold or adjust the wages due to the applicant up to the time of the dismissal?; and
- Was this an offence which entitled Mr Lewis to summarily to the applicant?

### ***Discussion and analysis***

[16] Clearly there was an altercation on the worksite on Tuesday 14 September 2004 which led, on the evidence before the Authority, to the employer telling Mr Riwhi that he *had to let you go*. That statement amounts to a sending away and therefore, in an employment context, a dismissal.

[17] It appears from the evidence in front of the Authority that the only fault prior to this incident which involved any criticism of the applicant's work was two occasions on which Mr Lewis upbraided Mr Riwhi for working too slowly. It appears that in the context of the error made by the applicant in regard to a six metre metal sheet being incorrectly drilled, that this was the basis of the applicant's dismissal. The applicant accepted that Mr Lewis had referred to a series of mistakes Mr Riwhi had made but gave no indication at any time as to what those mistakes were.

[18] It is clear on the basis on the information available to me that this incident was a matter of performance at best, and as such did not entitle the employer to summarily dismiss. As I noted above, the applicant did not have a written employment agreement let alone any documentation which would signal Mr Riwhi's agreement to the withholding of wages or the deduction of any money from his entitlement. Put simply, without the agreement of the applicant, Mr Lewis was not entitled to deduct any money from the applicant's wages. It was clear at the investigation meeting that Mr Riwhi accepted he had badly drilled one sheet and further accepts that this was careless of him.

### ***Determination***

[19] Although brief, both witnesses before the Authority were clearly credible in what they told me and both were firm and direct in their responses to the questions I put to them, being ready to concede where they may have been in error. Mr Riwhi told me that he had obtained on-call work as a casual labourer at a seafood processing plant in Bluff. He obtained this work in January 2005. He therefore did what was possible to mitigate his situation.

[20] I find Mr Riwhi has been unjustifiably dismissed from his employment with Stewart Lewis. Having come to this decision I turn to the matter of remedies.

### ***Remedies***

[21] In assessing what sums are due to the applicant I need to bear in mind that the period of employment was moderately short being from 26 April 2004 through until 14 September 2004. I have taken this matter into account in setting the remedies payable to the applicant.

[22] The respondent is to pay the applicant the following sum:

- (a) Two weeks wages being the sum of \$1190.00 gross;
- (b) Holiday pay, in the sum of \$524.88 gross;

- (c) Three months lost remuneration under section 123 (b) of the Employment Relations Act 2000, in the sum of \$5688.00 gross;
- (d) Compensation for humiliation, loss of dignity and injury to feelings under section 123 (c)(i) of the Employment Relations Act 2000, in the sum of \$4000.00. This latter sum is to be paid to the applicant without deduction.

### ***Costs***

[23] At the close of the investigation meeting I invited counsel to file a memorandum on costs, signalling that I would deal with this matter in the substantive determination. Ms Bahlman duly provided a memorandum which was received by the Authority on 19 August 2005. Mr Riwhi was legally aided in bringing his claim before the Authority and I have seen copies of counsel's invoices provided to the Legal Services Agency. The total amount sought in costs from the respondent is \$2341.56 which is full client-solicitor costs in this instance.

[24] The Authority is required to balance a range of factors when assessing costs. In this case the respondent has provided both elusive and uncooperative. No statement in reply was lodged and no appearance at the investigation meeting was forthcoming. While the investigation meeting itself was relatively brief, the Authority accepts that counsel for the applicant was put to unusual trouble by the behaviour of the respondent. In this context I am required to consider what constitutes a fair contribution to the reasonably incurred costs of the applicant. This is a case where costs should follow the event and in this particular matter I believe the respondent should contribute the sum of \$1600.00 to the costs reasonably incurred by Mr Riwhi. I so order.

Paul Montgomery  
Member of Employment Relations Authority