

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Evert Roland (Applicant)
AND Amalgamated Builders Limited (Respondent)
REPRESENTATIVES Philip Horrocks, Counsel for Applicant
Don Rhodes, Advocate for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 4 May 2005
DATE OF DETERMINATION 20 June 2005

DETERMINATION OF THE AUTHORITY

[1] The applicant, Evert Roland, was employed by the respondent, Amalgamated Builders Limited (“Amalgamated Builders”), as a senior quantity surveyor. He commenced employment on or about 15 May 2000.

[2] His terms and conditions of employment were contained in an undated letter from the managing director of Amalgamated Builders, Patrick Burke. They included a salary of \$55,000.00 per annum, mobile phone and charges, a probationary period of three months, a petrol card and vehicle expenses. In order to take up employment with Amalgamated Builders Mr Roland sold his business in Auckland. He was interested in obtaining a position in the South Island to be closer to his children who were studying at Cromwell College.

[3] Mr Roland was dismissed from his employment with Amalgamated Builders by letter dated 18 December 2000. He was paid in lieu of notice until the end of January 2001. The reason for his dismissal was stated in the letter of 18 December to be a loss of confidence in Mr Roland’s ability to perform in his role.

[4] Mr Roland says that his dismissal was unjustified and that prior to a letter given to Mr Roland on 7 December 2000 he had not been warned orally or in writing about his performance.

[5] Amalgamated Builders say that they were justified in dismissing Mr Roland because of serious performance concerns and further, that he could not provide an adequate explanation to the concerns.

[6] Mr Roland seeks a full accounting of wages, holiday pay and other entitlements to the end of January 2001. He also seeks to recover unpaid mileage in the sum of \$2,977.50 and compensation in the sum of \$20,000.

[7] The issues for determination in this case are:

- Whether Amalgamated Builders could fairly and reasonably have dismissed Mr Roland for poor work performance.
- If I am required to deal with remedies, whether Mr Roland's actions contributed toward the situation that gave rise to the grievance.
- Whether the payment of mileage for Mr Roland's use of his vehicle for work purposes was a term and condition of his employment and whether the amount claimed is fair and reasonable.

Whether Amalgamated Builders could fairly and reasonably have dismissed Mr Roland for poor work performance.

Reason for termination of employment

[8] Mr Roland was dismissed for reasons of poor performance. Amalgamated Builders say that the concerns culminated in a loss of confidence in Mr Roland's ability to continue his employment with them as a senior quantity surveyor in Queenstown.

Was Mr Roland properly warned about his performance before he was dismissed?

[9] It is accepted that there was no formal warning process undertaken with Mr Roland before he received a letter signed by the area manager to whom Mr Roland reported, Ian Robb, setting out performance concerns on 7 December 2000 and headed up *serious concerns over work performance*. Mr Roland was asked in the letter to attend a meeting on 11 December to discuss the performance concerns.

[10] Mr Burke and Mr Robb said that they conveyed to Mr Roland from time to time how dissatisfied they were with his performance in the areas of tender preparation, management of projects, the fact that he was not using company systems and complaints received from foremen and sub-contractors.

[11] The evidence supported that Mr Roland was not clear until he received the letter of 7 December 2000 that his employer was so dissatisfied with his performance that unless there was improvement he could be dismissed.

[12] There was the statement by Mr Roland at the meeting on 11 December 2000 to discuss performance concerns that he was surprised and annoyed at the contents of the letter of 7 December 2000. I would not have expected him to have used the word surprised if he was clear as to the degree of his employer's dissatisfaction with his performance. Likewise I would not have expected him to ask at the meeting whether the recent employment of a trainee quantity surveyor had anything to do with the raising of the issues of performance or his position.

[13] Mr Roland saw work discussions differently from Mr Robb and Mr Burke. He said, for example, that there had been discussion about pricing but he considered that pricing was a team effort and that the discussion was not in the nature of one about performance. He said before December 2000 there was no suggestion that his job *may be on the line*.

[14] In contrast to how Mr Robb and Mr Burke viewed his performance Mr Roland said that he had made a couple of mistakes but he had put through three million dollars of work. Mr Burke,

when I asked him, could not recall one positive contribution that Mr Roland had made to the company.

[15] I suspect it was difficult for Mr Burke and Mr Robb to make it clear to Mr Roland the extent of their dissatisfaction. He was a reasonable employee who Mr Robb accepted would do as instructed and conform at least initially to suggestions made. There was a further difficulty in that Mr Roland reported to Mr Robb who had, what he described, as *a bit of a personality clash* with Mr Roland and could not relate to him. This would have had an impact on the nature of the exchanges and how each party viewed them.

[16] In conclusion, while I accept that from time to time Mr Roland was spoken to about matters related to his day to day work including systems, I am not satisfied he was warned before the letter of 7 December 2000 clearly and unequivocally that Amalgamated Builders were of the view that his performance was inadequate and that if it did not improve to the standard required then he would face the consequence of dismissal. In the circumstances of this case, notwithstanding that Mr Roland was a senior quantity surveyor, I find that fairness required that Mr Roland should have been explicitly warned before 7 December 2000 that his work performance was poor and of the consequences if his performance did not improve within a certain period of time.

Meeting of 11 December 2000 and events leading to dismissal

[17] Phillip Roberts from the Employers Association assisted the company in drafting the letter of 7 December to Mr Roland setting out the performance concerns.

[18] Mr Roland attended the meeting on 11 December 2000 with his brother-in-law Derrick Wales who is an accountant in Wanaka. Mr Burke, Mr Robb and Mr Roberts were present on behalf of the company. I have relied on Mr Wales' notes of the meeting as they are the only available record of the discussion and I accept that whilst not a verbatim record they were notes made at the time which give a fair overview of the meeting.

[19] The specific concerns set out in the 7 December letter in bullet form under a series of headings were discussed with Mr Roland at the meeting and his explanation sought with respect to each matter.

[20] Some of Mr Roland's explanations to the performance concerns raised with him in my view required further investigation. Mr Burke indicated during the meeting that they could not find the original quote on the computer for the golf club job but Mr Roland was adamant that it was there. Mr Roland said that some of the estimates were checked by Mr Robb. Mr Roland also said that he understood other tenders had in fact been higher than the one he was responsible for submitting and maintained in terms of the golf club that there was nothing wrong with his price that had been reviewed by Mr Robb. Under subcontractor prices Mr Wales notes reflect that Mr Roland felt that since being given instructions to follow the procedure he had in fact done so. It is noted that Mr Roberts asked Mr Robb whether the system was being followed now and that Mr Robb and Mr Burke said that they did not think so. I am of the view that this response supports the lack of targets to be met before December and the lack of an objective assessment of them.

[21] Mr Roland did accept that he had made an error by under claiming in the progress claim for the Wanaka Community Centre by about \$100,000.00. The under claim was picked up by others in the company and a revised claim put in. Mr Robb said that that was really the catalyst for the letter of 7 December 2000.

[22] After the meeting Mr Robb, Mr Burke and Mr Roberts met and discussed Mr Roland's explanations. I am not satisfied that aside from that discussion there was an attempt to investigate Mr Roland's explanations by considering computer records or other records. It was felt that the mistakes Mr Roland was making were of a basic nature and Mr Burke, who I find was ultimately the decision maker, was not satisfied with the explanations.

[23] A letter was prepared to be given to Mr Roland dated 12 December 2000 but the letter was not handed to Mr Roland until 14 December 2000. The letter concluded that the company believed it had reasonable grounds to justify the termination of Mr Roland's employment but was prepared to consider any written comments that Mr Roland wished to make by 18 December 2000. The company was aware that Mr Roland was going overseas on Tuesday 19 December 2000 to Canada. Mr Roland felt and I think he is correct that there was no *great reference* to what had been said on 11 December in the letter by him by way of explanation. Mr Roland said that he was expecting reasons why his explanations had not been accepted. It is important for an employee to understand why explanations have not been accepted. The reasons were not clear to Mr Roland.

[24] Mr Horrocks wrote to Amalgamated Builders on behalf of Mr Roland on 18 December 2000. He expressed in his letter surprise that only *lip service* appeared to be paid in the letter of 12 December 2000 to the explanations provided by Mr Roland. He concluded his letter by saying that if it was the company's intention to terminate Mr Roland's employment then the responsible attitude would be to negotiate a termination package and further alleged that there had been predetermination to dismiss.

[25] Amalgamated Builders responded to Mr Roland by letter copied to Mr Horrocks on 18 December 2000. Amalgamated Builders agreed with Mr Horrocks comments that the responsible attitude would be to negotiate a termination package but that that should be clarified before Mr Roland departed overseas. The letter then went on to state that termination of Mr Roland's employment was justified and it was the company's proposal to terminate his employment from the end of January 2001 and that in the circumstances he was not required to work the notice period out.

[26] Mr Roland said that he felt the claims by the company were not correct and that when he went on holiday he was not quite sure as to whether he had a job or not. When he returned to Queenstown in January he was able to obtain some temporary employment and was then required to relocate to Auckland to set up in business again. He said that he was sad to be separated from his children in Cromwell as he had wanted to be a family again.

[27] Mr Horrocks on Mr Roland's behalf wrote a letter on 22 December 2000 notifying a personal grievance and seeking on Mr Roland's behalf reinstatement. There were no further steps taken by Mr Roland in relation to the matter until a statement of problem was lodged with the Authority in December 2003.

Conclusion

[28] I turn to whether a fair and reasonable employer could have dismissed Mr Roland on 18 December 2000 for serious concerns with respect to his performance.

[29] I found the witnesses to be credible and genuine in their views. Mr Burke and Mr Robb were frustrated with Mr Roland and they were entitled to raise performance concerns with him. An employer however is obliged by law to give an employee time to improve performance in the knowledge that failure to do so would result in a termination of employment. In this case

frustrations had built up to a degree that I am not satisfied Mr Roland's explanation could be considered dispassionately at the meeting on 11 December.

[30] Amalgamated Builders did not point out to Mr Roland very clearly his shortcomings, advise him how he could improve and warn him of the consequences of not doing so within a reasonable period before they moved to dismiss him on 18 December 2000. Mr Roland was given further training in the company's computer systems but I do not find that a fair trial of Mr Roland's work performance took place in a way that would enable the employer to conclude that Mr Roland's performance was so deficient that it justified dismissal.

[31] The short period of time between the meeting on 11 December 2000 and the preparation of the letter of 12 December 2000 which stated a belief that the company had reasonable grounds to justify termination of employment was suggestive of a closed mind approach to the matter of Mr Roland's continued employment. I noted Mr Robb's evidence to me that he did not really believe Mr Roland would be able to explain the serious performance concerns at the meeting on 11 December. There did not appear to be a careful analysis of Mr Roland's explanations at the meeting on 11 December 2000 and no further investigation of computer records. It was unclear as to what Mr Roland was to be responding to in the letter of 12 December having already given full explanation on 11 December to the performance issues.

[32] I find that there were substantial flaws in the procedure adopted by Amalgamated Builders and I conclude that Amalgamated Builders could not have fairly and reasonably dismissed Mr Roland for poor work performance.

Determination

[33] Mr Roland was unjustifiably dismissed by Amalgamated Builders and he has a personal grievance. He is entitled to remedies.

Remedies

Accounting of money paid

[34] A full accounting has now been provided to the Authority of money paid to Mr Roland following the termination of his employment. If there are any remaining issues about reimbursement of remuneration I reserve leave for the applicant to come back to the Authority.

Contribution

[35] Mr Roland accepted that he made a mistake with the under claiming for the carpentry component of the Wanaka Community Centre in the sum of \$100,000.00. It was a mistake that was picked up before it caused any harm. What I find to be the blameworthy contribution in that matter is that Mr Roland did not seem to show at the meeting with his employer any insight about the mistake in a way that may have reassured the company that it could have continued confidence in him. Mr Roland simply said that it would have been picked up on the next progress payment claim. That did not show an understanding about the cashflow effect for the company. I am of the view that Mr Roland's answer in part contributed to the situation in that Mr Burke's view was that Mr Roland was flippant. In all the circumstances I assess contribution at 20%.

Compensation

[36] Mr Roland said to me that he felt the dismissal was a *bit brutal*. He was not clear why his explanations were not accepted when he thought the company claims were not correct. I accept that this was difficult for Mr Roland as a professional.

[37] The dismissal came at a time when Mr Roland was just about to leave for his holiday and he was somewhat uncertain as to whether he was still employed or not and what the situation was to be on his return. Mr Roland was then required to start up a business again in Auckland and leave his family behind in Cromwell. He was saddened by that. While I think \$20,000.00 is somewhat excessive I am of the view that the circumstances in this case call for a reasonably substantial award. An appropriate award taking contribution into account would be \$8000.00.

[38] I order Amalgamated Builders Limited to pay to Evert Roland the sum of \$8000.00 without deduction under section 123 (c) (i) of the Employment Relations Act 2000.

Mileage

[39] Mr Roland was entitled to vehicle expenses. Amalgamated Builders say that the mileage claim is excessive and further that Mr Roland purchased petrol for private use using his petrol card which they have off set against the claim. I am of the view that Mr Roland is entitled to some payment toward the mileage expenses that he incurred whilst on company business using his own car. In all the circumstances and taking into account the conflicting views I think that Mr Roland should be reimbursed \$1000.00 gross toward mileage for trips to Wanaka and Gibbston Valley Wines.

[40] I order Amalgamated Builders Limited to pay to Evert Roland the sum of \$1000.00 gross being mileage expenses.

Costs

[41] I reserve the issue of costs.

Helen Doyle
Member of Employment Relations Authority