IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 177/09
5139009

	BETWEEN	ROBERT JAMES SKERTEN Applicant
	AND	D L MITCHELLPLUMBING & DRAINAGE LIMITED Respondent

Member of Authority:	Paul Montgomery
Representatives:	Jenny and Jon Beck, Counsel for Applicant Donald Mitchell, Advocate for Respondent
Investigation Meeting:	7 July 2009 at Dunedin
Submissions received:	18 August 2009 from Applicant None received from Respondent
Determination:	15 October 2009

DETERMINATION OF THE AUTHORITY

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[1] The applicant claims to have been unjustifiably dismissed from his position as a trainee plumber with an assurance of an apprenticeship. Further, Mr Skerten says deductions from his wages were made without his written authorisation. He seeks the remedies of lost remuneration for 13 weeks; compensation for hurt and humiliation *and inconvenience* in the sum of $8,000; a refund from the respondent of the sum of $949.05 for unlawful deductions; and costs.

[2] The respondent advised the applicant by way of a letter dated 27 June 2008 that it had failed to secure contracts and needed to downsize its operation. As the respondent wished to retain its most experienced staff and it viewed Mr Skerten as a less experienced employee, it advised the applicant that it was his position which was to be disestablished, *subject to what you have to say about that*. The letter asked Mr Skerten to attend a meeting with Mr Mitchell to discuss the respondent's proposition of dispensing with his services on payment of one week's wages.

[3] Further, the respondent advised *all outstanding tool money to be paid up before you leave or you may return the tools and this will be credited against your outstanding debt*.

[4] In a letter of 6 July 2009, the respondent's accountants advised the respondent had ceased to trade on 31 March 2009. The letter stated the company was neither in receivership nor liquidation but was attempting to realise its assets and settle outstanding liabilities to all creditors.

Essential facts

[5] In response to the respondent's letter of 27 June 2008, the applicant's solicitor wrote on 30 June 2008 and advised that his client did not accept his redundancy was genuine but that he would return all company property, including tools. Mr Beck advised his client would settle for one month's wages.

[6] The respondent replied offering two weeks' pay and reimbursement of all tool money on return of the tools. The applicant, through Mr Beck, declined this offer.

[7] None of the correspondence between the parties is marked *without prejudice*.

[8] The matter did not settle between the parties nor did it resolve in mediation.

[9] There is no written employment agreement which governed the arrangements between the parties.

The issues

[10] To resolve this matter, the Authority needs to make findings on the following issues:

- Was the respondent entitled to deduct money from the applicant's wages; and
- Was a proper process of consultation with the applicant undertaken by the respondent; and
- Was the selection process conducted properly; and

- Was the applicant unjustifiably dismissed and, if so, what remedies are due to him; and

- Did the applicant contribute to the circumstances which gave rise to his alleged grievance?

The test

[11] The test for justification is set out in s.103A of the Employment Relations Act 2000 and its amendments. It says 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.

The investigation meeting

[12] The Authority heard evidence from the applicant in person and also evidence from his mother, Mrs Rhonda Skerten. For the respondent, evidence was presented in person by Mr Mitchell.

[13] The meeting was generally cordial and the Authority records its thanks to those who gave evidence.

Analysis and discussion

[14] On 27 June 2008, Mr Mitchell wrote to Mr Skerten:

> *Dear Robbie,*
>
> *Due to unsuccessful tender of contracts we have been forced to downsize the business.*
>
> *To achieve this I am proposing to reduce the number of trade staff by one. I want to keep on the best staff, those who have the best skills and who work most efficiently and accurately.*
>
> *I am sorry to say that you are the member of staff I have selected for redundancy, subject to considering what you have to say about that. I would like to meet with you on Monday morning at 10am at the office. This is your opportunity to comment on what I'm proposing to do. You may bring a representative or support person to the meeting if you would like to. I appreciate that you will need some time to think this over before then so if you would like to take this afternoon off work, you are welcome to do so.*

> *If I go ahead with this plan, you would be entitled to one week's notice, under the terms of your employment agreement. I would be agreeable to paying this out. You are not entitled to redundancy compensation. Let me know if you have any other questions, otherwise I will see you on Monday morning.*
>
> *All outstanding tool money to be paid up before you leave or you may return the tools and this will be credited against your outstanding debt.*
>
> *Yours sincerely,*
> *Donald L Mitchell*
> *Managing Director*
> *D L Mitchell Plumbing & Drainage Limited*

[15] Mr Skerten began working for the respondent as a trainee plumber in October 2007. He was not employed as an apprentice immediately but put on a six month trial. His hourly rate was $12.60 but he received $12 per hour as 60 cents was automatically deducted from his hourly rate to cover tools. I am satisfied the applicant was employed under a promise he would get an apprenticeship.

[16] In January 2008, the respondent employed another young person whom, it later transpired, was offered an apprenticeship from the outset. Once aware of this matter, the applicant was concerned. When the six month trial period for the applicant ended, Mr Skerten asked Mr Mitchell about his apprenticeship. Mr Mitchell said that the applicant *needed to be more independent* and when Mrs Skerten telephoned Mr Mitchell to discuss this matter, she was told that the respondent had concerns that the applicant would struggle at Polytech. The applicant borrowed some Polytech papers from another plumber and worked on them during the evenings after work and did not find them particularly difficult. It was shortly after this that the letter set out above was sent to the applicant.

[17] While the letter appears to provide the opportunity for Mr Skerten to comment, it falls short of the requirements because it is clear a decision has already been made; *you are the member of staff I have selected for redundancy*. The final sentence of the letter makes it quite clear *All outstanding tool money to be paid up before you leave or you may return the tools and this will be credited against your outstanding debt*.

[18] On the evidence, the respondent has failed to meet its obligations to the applicant. Further, it held out the promise of an apprenticeship to Mr Skerten and failed to deliver on that promise.

[19] It is fair to say the intentions of the respondent were genuine, but it failed to engage with Mr Skerten before it declared his position redundant. Its financial position deteriorated further while the applicant's solicitor sought redress for Mr Skerten.

[20] The brutal reality is the respondent company ceased to trade on 31 March 2009 and Mr Mitchell, who was legally never the applicant's lawyer, has now ceased to work for the respondent and is employed elsewhere on wages.

[21] Regrettably, the respondent is in no position to meet the applicant's demands until its assets are realised. Even at that point, there is no assurance Mr Skerten would be paid whatever the Authority might award him. Nonetheless, on the evidence before the Authority, the applicant has legitimate claims.

[22] The respondent failed to provide a written employment agreement pursuant to s.65 of the Act and, further, had entered into a probationary arrangement without the fact of the probation or trial period being specified in writing in the employment agreement pursuant to s.67 of the Act.

[23] As there is no written agreement, there is no right to deduct money for tools purchased for the use of the applicant. Section 5 of the Wages Protection Act 1983 reads:

> ***Deductions with workers' consent***
>
> *(1) An employer may, for any lawful purpose, -*
>
> *(a) With the written consent of a worker; or*
>
> *(b) On the written request of a worker –*
>
> *make deductions from wages payable to that worker.*

[24] In light of the above, the deduction of 60 cents per hour is unlawful.

[25] On the balance of probability, I believe the respondent offered Mr Skerten the opportunity to undertake an apprenticeship but later changed his mind in the face of dropping work prospects. That, however, does not explain his agreeing to employing another young worker and soon thereafter give that worker the papers required to enrol for his apprenticeship.

[26] As the respondent has ceased to trade, I find the employment of Mr Skerten would likely have come to an end in any event. In that sense, the redundancy was substantively justified. However, the process adopted by the respondent falls well short of the standard required and renders the dismissal unjustified.

[27] On the evidence of Mrs Skerten, I find the applicant has suffered hurt and humiliation and considerable inconvenience as a result of his dismissal.

[28] On the other hand, I find Mr Mitchell made genuine attempts to locate another employer who might offer employment and an apprenticeship to Mr Skerten, but was unable to do so. Those attempts go to Mr Mitchell's credit.

Determination

[29] Returning to the issues set out above, I find:

- In the absence of a written agreement, the respondent was not entitled to deduct tool money from the applicant's wages. It follows the returned tools are the property of the respondent.

- The consultation took place only after the applicant was advised in writing that his was the position selected for redundancy.

- The selection process was not transparent and preceded notification of the redundancy.

- Mr Skerten was unjustifiably dismissed and is entitled to remedies.

- Mr Skerten did not contribute to the circumstances which gave rise to his dismissal.

Remedies

[30] Mr Skerten has claimed 13 weeks loss of remuneration resulting from his grievance. At the time of the dismissal, the applicant's solicitor sought four weeks' wages to resolve all matters relating to his client's dismissal. Mr Mitchell rebuffed this offer. Section 128(2) of the Act requires that the Authority, in circumstances in which it has found an employee has a personal grievance, *must, whether or not it provides for any of the other remedies provided for in s.123, order the employer to*

pay the employee the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration.

[31] On that basis, I award Mr Skerten the sum of $6,552 gross.

[32] The applicant sought compensation for distress, humiliation and inconvenience in the sum of $8,000. Having considered the evidence before the Authority and the way in which the employer acted, I think it just to award the applicant the compensatory sum of $3,500 under s.123(1)(c)(i) of the Act.

[33] Having found that the deduction made from the applicant's wages without written consent was unlawful, I order the respondent to pay the applicant the sum of $949.05 without deduction.

Costs

[34] Costs are reserved.

Paul Montgomery
Member of the Employment Relations Authority