

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number: WA 138/07
File Number: 5078569

BETWEEN CHRISTOPHER BARNETT
(Applicant)

AND BROOKLYN HOLDINGS LIMITED,
I J CONTRACTORS LIMITED AND
LANCE JAMES
(Respondents)

Member of Authority: P R Stapp

Representatives: Russell Buchanan, Counsel for Applicant
Philip Bremer, Counsel for Respondents

Investigation Meeting: 26 July & 14 August 2007 at Wellington

Telephone Conference 29 August 2007

Further Evidence and
Reply from the Parties By 6 September 2007

Determination: 15 October 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Christopher Barnett has raised a personal grievance that he was unjustifiably dismissed from his employment with I J Contracting Limited. He is seeking lost wages, compensation and costs.

[2] The respondents denied the allegations. In particular, I J Contractors Limited and Lance James denied that they were Mr Barnett's employer. Brooklyn Holdings Limited accepted it was Mr Barnett's employer. In all other respects it denied Mr Barnett's claims.

The Issues

[3] The issues can be summarised as follows:

- Who was the applicant's employer?
- Was the applicant employed at any stage by IJ Contractors Limited and Lance James?
- Does the evidence from Lombard satisfy justification for Mr Barnett's redundancy?
- Is Mr James' evidence in regard to the reasoning for restructuring adequate?
- What did Mr James advise staff at the meeting held at the end of September 2006?
- What was the purpose of Mr James' undated letter given to Mr Barnett at the meeting held at the end of September 2006?
- Who gave Mr Barnett the individual employment agreement, when was it given to him and was he asked to sign the agreement?
- What was the purpose of the individual employment agreement? Was it a draft agreement or confirmation of an offer and acceptance of employment with IJ Contractors Limited?
- Was there any "finishing" work required after 2 October 2006?
- Did Mr Barnett accept the situation and decide to agree to leave on 2 October 2006?
- Was Mr Barnett declared redundant or did he voluntarily resign?
- Did Mr Barnett's employer have any motive, such as performance, to end his employment?
- Which Respondent is liable for the claims, and for what?

The Facts

[4] Mr Barnett commenced employment with Brooklyn Holdings Limited as a finishing manager in March 2006. He was employed on a permanent basis and full time. He was never provided with an employment agreement.

[5] At the end of September 2006, Mr Barnett attended a meeting of managers and the workforce where he says they were informed that Mr Lance James, the owner, intended to rearrange his business and that that would mean a change in the nature of their employment relationships. Mr Barnett says Mr James told those present that their jobs were secure. Mr James denied that allegation.

[6] The applicant says that Mr James told those present at the meeting that the business of Brooklyn Holdings Limited would cease and that a new business, IJ Contractors Limited, was being established to manage the same workloads and would be working with subcontractors etc. He was handed a pre-prepared and undated letter by Mr James that explained the proposed changes.

[7] That letter advised Mr Barnett that *fresh contracts of employment will (sic) offered with IJ Contractors Limited and I J Drainlaying Limited. Wage rates and conditions will be the same as they were previously.* In a subsequent paragraph, the letter advised Mr Barnett that *final payment from Brooklyn Holding (“BHL”) will be made on 5 October 2006; subsequently you will be re-employed by I J Contractors-IJ Drainlaying Limited as of 1 October 2006.*

[8] Prior to this meeting Mr James met with Mr Milo Faletolu, project manager, and they discussed the restructure of the companies for refinancing purposes and that there would be some impact on Mr Barnett’s role. They discussed two options involving Mr Barnett: the possibly of him going back on the tools or he would have to leave because there would not be enough work for him.

[9] Mr Barnett says that he was handed a contract of employment on 2 October 2006 by Mr James that he understood was an offer of employment with IJ Contractors Limited that he accepted. He says he signed the contract, and dated it 3 October 2006, as requested and put it back in an in-tray in the office. Mr James says that this was a draft proposal that was indicative of the type of arrangement that was envisaged but that the terms of any final agreement upon acceptance would be negotiated with the individuals involved. Mr James denied receiving a signed copy but he agreed that is

not to say it was put there by Mr Barnett. Mr James does not know how Mr Barnett came by the agreement because he says he did not give a copy to Mr James. Mr Faletolu was adamant he did not give a copy to Mr Barnett. One of the reasons why I wished to interview Mr Faletolu was that Mr Barnett told me during his interview that he was given the agreement by his supervisor, Mr Faletolu on 2 October at that meeting.

[10] On 5 October 2006, Mr James invited Mr Barnett to a meeting. The applicant says he had no indication of the purpose of the meeting but that during the meeting he was told his job was to be terminated forthwith. Mr Barnett says that by this time he understood his employer to be I J Contractors Limited. Mr James denied this and says that Mr Barnett's employer remained with Brooklyn Holdings Limited ("BHL").

[11] Mr Barnett says the only explanation offered by Mr James to him about the termination of his employment related to his work performance and that other members of the management team could no longer work with him. The applicant says this was the first time that he became aware of this and was shocked. Mr James says that Mr Barnett accepted the situation that his job would change and that he was aware that there was diminishing finishing work required on the site. Mr James says Mr Barnett agreed to leave and accepted two weeks' wages.

[12] The applicant returned to work on 6 October 2006 to collect his personal belongings and return the company's cellphone. Mr Faletolu says he saw Mr Barnett at that time. Mr Faletolu says Mr Barnett was waving a copy of the agreement and Mr Barnett told him that he would sue or be taking the matter to Court. Mr Faletolu says Mr Barnett was upset.

[13] Mr Barnett obtained new employment in Napier on 26 October 2006, and except for one week, employment with that employer continued through until shortly before the Authority's investigation meeting.

[14] The applicant says that it is his belief Mr James intended to terminate his services and that Mr James had hidden behind a conveniently timed change in his business structure to dismiss him.

The Authority's Determination

- **The Restructure and Redundancy-The Justification**

[15] Mr James says that the restructuring situation arose out of the completion of the first stage of the development on the Brooklyn Rise residential development in Brooklyn, Wellington. He says the completion of the first stage comprised 40 sites and that was the end of the first stage of the development. Other stages of the development were contemplated once the land was completed. He says finance was required for the further stages of the development and this was obtained from Lombard Finance and Investment Limited (Lombard) that required its security to be ring circled with a 22 December 2006 for the change.

[16] Part of the approval for Lombard's financing of the remaining 63 sites of the three stages of the development and the 15 hectares of the land to be developed as part of the further stages of the development required a separate development company to be incorporated to provide Lombard with security over the development of the 63 sites and 15 hectares. It was decided that the development was to be carried out by a separate construction company and this was split between I J Contractors Limited ("IJC") and IJ Drainlaying Limited.

[17] The restructuring was expected to happen on 1 October 2006 but the actual transfer of the properties from BHL to Brooklyn Rise Limited ("BRL") took much longer. Indeed, Lombard required the restructure to take place by 22 December 2006. Mr Barnett was not informed of this time arrangement. However I am satisfied that the finishing work on Stage 1 slowed down and what was left to be done was shared out without a finishing manager.

[18] I accept that Mr Barnett was employed by BHL. I accept that the restructuring meant that BHL would no longer carry on the business of a construction company but it would appear from the information produced BHL's role continued until 22 December 2006. Mr Barnett told me that did not know that. However I am satisfied that Mr Barnett decided that he did not want to work on the tools to help provide him with full time work that would not have been otherwise available just in the finishing manager's role. Therefore he was affected by the situation meaning that he would become redundant.

[19] The restructuring meant that, inevitably, there was going to be some redundancies. Other people were affected with transfers. Mr James has provided a list of these people that satisfied me that a number of employees were involved and transfers made.

- **The Restructuring and Redundancy-The Process and Procedure**

[20] The process was not prescribed. Mr James says the meetings in September with managers and the workforce and the meeting with Mr James on 5 October were preliminary meetings for consultation. However, when Mr Barnett decided to accept the situation and leave, he cut any further process short. Mr James says that he gave Mr Barnett the option that he could go back on the tools because of the slow down in work on finishing to provide him with full time work. Mr Barnett rejected this.

[21] There is a credibility issue over whether Mr James advised all those at the September meeting that their jobs were secure. There is also a credibility issue over whether Mr James told all employees and subcontractors that they would be retained.

[22] Mr James denied that he said their jobs were secure and that he would retain all employees and subcontractors. He was supported by Mr Faletolu. It is likely they did not actually say as much but their actions and the undated letter were enough for Mr Barnett to reach a reasonably held conclusion that he was secure in his role except for the change of employer.

[23] Furthermore it is more than likely that Mr Barnett reasonably came to the conclusion that he was secure and he would be retained because Mr Faletolu told the Authority that he did not raise any impact of any changes on Mr Barnett with the workforce to avoid any panic. I accept that the purpose of the meeting was to outline the changes needed for the refinancing with Lombard. The undated letter confirmed that there needed to be employment changes. This notice met the requirements of consultation. I am satisfied that there was not deceptive conduct because other meetings on an individual basis were later held that included Mr Barnett. Furthermore the slowdown in work and the restructuring arrangements were supported by the Lombard arrangements that required the restructure to take place by 22 December 2006. I am satisfied that the development involved a slowdown in the period significant enough for BHL to offer Mr Barnett an option to go back on the tools. Mr James' evidence of meeting with Mr Barnett later was for the purpose of trying to sort something out.

[24] Also, Mr Barnett could have reasonably concluded he would be employed by IJC, given the timing arrangements for pay that was clearly and unambiguously outlined in the undated letter which was given out. That letter led Mr Barnett to

reasonably conclude he could expect a change in his employer. However, there was no change in pay arrangements before he left. BHL continued to pay Mr Barnett (payslips produced). The interceding event was the disputed circumstances involving Mr Barnett leaving his employment that I will deal with shortly.

- **The Purpose of the Employment Agreement**

[25] There is an issue over the purpose of the employment agreement that came into Mr Barnett's possession because he relies upon it to support him that his intended employer was IJC from 1 October. Mr James says that the agreement was not an offer of employment with IJC, but a draft. Yvett James a consultant supported this. She drafted the document on Mr James' instruction to tidy up his employment affairs in August when she set about the task. She says she sent the template of the document to the business's office and someone there arranged for the document to be drafted, as it was with Mr Barnett's role, position, rate of pay and the purported employer's name-IJC. She put in the commencement date of 1 August 2006 in the agreement and that date was left in it. Mr James says it was intended to show that the decision as to who would be employed by IJC had not been pre-determined. It was also intended to allow those employees that would be later employed by IJC to have the opportunity to consider the proposed terms and conditions before accepting any offer. In terms of the earlier undated letter the situation of what would be offered is unclear because the letter says "*Wage rates and conditions will be the same as they were previously*". From the evidence I can only conclude that any consideration would have related to the role. The evidence supports Mr Barnett's role changing because he was offered the opportunity to return to the tools for full time work and that the finishing role diminished and the development slowed down.

[26] The agreement was not signed by Mr James. He says he does not know how Mr Barnett came by the copy. It seems that Mr Barnett received it on 2 October following the first meeting. During his evidence he told me that Mr James gave it to him on 2 October (written statement). He also told me that his "supervisor" (who he said was Mr Faletolu) gave it to him (oral evidence). Mr James and Mr Faletolu denied giving it to him. This was contradictory evidence and was not supported. It remains unexplained how he got the agreement given that Mr James did not say he actually gave it to him in his evidence, and in the Authority he denied giving it to him. This is consistent with Mr James saying he had not seen the signed copy that Mr Barnett says he put in the

office in-tray. In the circumstances I can not accept that it was determinative of an offer given it was not signed for and on behalf of the employer and it remains unexplained how Mr Barnett came into possession of it.

[27] I am satisfied that the purpose of the employment agreement being drafted was to clean up Mr James' business affairs according to Evett James' evidence. It was also drafted to serve as an offer for discussion on the arrangements around a new employer even although it said that the "*Wage rates and conditions will be the same as they were previously*" and [the] "*final payment from Brooklyn Holding ("BHL") will be made on 5 October 2006; subsequently you will be re-employed by I J Contractors-IJ Drainlaying Limited as of 1 October 2006*". I am supported in my conclusion by Ms James' evidence of her involvement in drafting a template and the inclusion of the August date by her.

[28] There is also the dispute that has arisen over how Mr Barnett obtained a copy of the document he signed and he says he left in the office in-tray. These are factors that do not assist the applicant in his claim that the employment agreement served as an offer because his evidence has been challenged and I am not satisfied from the contradictory evidence he has given that he is correct. The circumstances are not conclusive for Mr Barnett to rest his claim on, I hold.

[29] It is my conclusion that there was consultation over the restructuring plans. There was the undated letter. There was the meeting with the work force and Mr James and Mr Faletolu. Mr James' individual meeting with Mr Barnett was of a preliminary nature to engage Mr Barnett on the changes. It is not likely that Mr James made an offer that was accepted given there needed to be some discussion on the role including what Mr Barnett was to do given he had turned down the offer to go back on the tools and there was not sufficient work available for him solely to work in the finishing role.

- **The Termination of Employment-How Did It Happen?**

[30] Mr James says that he did not terminate Mr Barnett's employment but instead Mr Barnett agreed to voluntarily leave knowing that the finishing work had run out and that he did not want to go back on the tools.

[31] Mr James says that it was Mr Barnett who referred to performance issues first at their meeting. Mr James says that he was only aware of one issue involving two clients who did not want to work with Mr Barnett again. Mr James says this happened some

eight to 10 weeks before the meetings in September and October but he did not say anything to Mr Barnett then because it was not an issue. I am satisfied that performance was not a significant issue considering the restructuring evidence. It certainly was not a reason advanced for any justification for terminating Mr Barnett's employment, which is more consistent with Mr James offering Mr Barnett the choice of going back on the tools or facing being made redundant. There was no discussion between Mr James and Mr Faletolu on Mr Barnett's performance. Indeed Mr Faletolu was happy with Mr Barnett's performance. Mr Faletolu was endeavouring to help Mr Barnett by making recommendations to Mr James over what to do for Mr Barnett.

[32] Mr Faletolu told the Authority that Mr Barnett had finished his work which contrasted with Mr James who told the Authority that Mr Barnett had not finished the work required of him. This is one conflict in their evidence and I am satisfied it has more to do with the context of the work required and the nature of finishing work and relationships with owners as they took over the units in the development. On its own it is not enough to suggest that Mr James acted maliciously towards Mr Barnett or that any ulterior motive existed. Therefore, Mr Barnett has not established that these points assist his claim.

[33] Mr Faletolu says he saw Mr Barnett waving a copy of the agreement and Mr Barnett told him that he would sue or be taking the matter to Court. Mr James had no knowledge of Mr Barnett saying he would sue or take the matter to Court until the Authority's investigation meeting. Mr Faletolu says Mr Barnett was upset at the time. Mr James offered Mr Barnett a reference, but Mr Barnett never took the offer up. These would be consistent with Mr Barnett's claim that he was dismissed. However the following evidence supports Mr James' version:

- Mr Barnett did not establish his version of events surrounding the employment agreement. Mr Barnett did not establish how he was given the employment agreement. It was not signed by Mr James. It has not been established that it was an offer and acceptance of a change in employment for Mr Barnett to have intending employment with IJ Contractors.
- Mr Faletolu was a credible witness and there was no reasons advanced why he would not tell the truth. His evidence made it very unlikely that

Mr Barnett was actually given an offer of employment with IJC. He only heard on Mr Barnett's last day what Mr Barnett said to him.

- Mr Faletolu was able to support the background to the restructuring and Mr James' role in it.
- Mr Barnett declined to return to the tools.
- Yvett James' evidence was plausible over the preparation and reasons for the draft employment agreement.
- Mr Barnett agreed to take the payment for 2 weeks wages.

[34] Mr Barnett's decision to leave was not affected by Lombard's deadline for BHL to restructure before 22 December 2006. However if there is any criticism of BHL it would have to be that Mr James did not properly consult on the timeframe for any change and that the Lombard requirement had to be met by 22 December 2006. I find that Mr Barnett was not disadvantaged by this when an announcement had been made of the changes envisaged around the structure of the employment and Mr Barnett was offered a role to go back on the tools, the finishing work had diminished and he accepted 2 weeks wages when he decided to leave.

Conclusion

[35] I conclude that Mr Barnett decided to leave of his own accord when his role changed, work was due to slow down and he declined to go back on the tools. In other words Mr Barnett has not established that he was dismissed.

[36] Mr Barnett's claims are dismissed.

[37] Costs are reserved.