

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 318  
5307244

BETWEEN                      MARK BRAND  
   Applicant  
  
AND                                INTERNO LIMITED  
   Respondent

Member of Authority:      K J Anderson  
  
Representatives:            D Feist, Advocate for the Applicant  
   T Kelly, Advocate for the Respondent  
  
Investigation Meeting:     26 May 2011 at Auckland  
  
Determination:              19 July 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The applicant, Mr Brand, presents two claims. Firstly, that his employment was affected to his disadvantage by an unjustifiable action by his employer. This claim relates to a reduction in working hours and associated earnings for the period January 2010 to the termination of Mr Brand's employment on or about 23rd April 2010. The second claim of Mr Brand is that the termination of his employment, on the above date, was an unjustified dismissal. Mr Brand asks the Authority to find that he has two personal grievances and award him the remedies of arrears of wage, reimbursement of lost wages, and compensation; for both grievances. Conversely, the respondent (Interno), via its Managing Director, Mr Tony Kelly, says that Mr Brand willingly agreed to a reduction in working hours, hence he was not unjustifiably disadvantaged in his employment. And in regard to the dismissal of Mr Brand, Mr Kelly says that this was justified on the ground of poor performance following appropriate warnings.

## **Background facts and evidence**

[2] Interno is a small joinery business. Before Mr Brand was employed, there was only Mr Kelly and an apprentice engaged in the business.

[3] Mr Brand is a cabinet maker. His evidence is that he has approximately 30 years of experience in the trade. He commenced his employment with Interno on or about 27<sup>th</sup> July 2009. The terms and conditions of Mr Brand's employment were provided within an employment agreement signed by him and Mr Kelly.

[4] It appears that the employment relationship between Mr Brand and Mr Kelly was reasonably satisfactory for the first six months of Mr Brand's employment, albeit Mr Kelly's evidence is that there were a few problems that he and Mr Brand had talked about. Mr Kelly says that he had occasion to give Mr Brand a verbal warning on 28<sup>th</sup> January 2009, but his general approach was to talk to Mr Brand about issues if they arose.

## **The reduction in working hours**

[5] Relevant to Mr Brand's claim of unjustifiable disadvantage and for wage arrears, are the provisions for the hours of work, at clause 6 of the employment agreement. In particular, the following:

6.1 The hours of work are those required to fulfil the responsibilities of the position and will be listed in schedule A attached.<sup>1</sup> It is recognised that due to the natures [sic] of the company's business, it may be necessary to work outside these hours to meet the requirement of the customer and to ensure all duties and targets are met. For wages employee's, [sic] extra payment will be made for these extra hours at the rate listed in schedule A.

6.2 Where a downturn in business results in an insufficient amount of work, the company may reduce the number of [sic] employee's ordinary hours as an alternative to redundancy or staff reductions, and the employee will be paid normal wage or commission at the appropriate prorata rate. The company must endeavour to reinstate the original hours as soon as business conditions allow. Full time employees shall have first option on available work.

[6] The evidence of Mr Kelly is that in early 2010, the business suffered from a downturn in cabinet making activity. Mr Kelly saw this as a temporary situation and

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<sup>1</sup> Schedule A provides that the *Normal Working Hours Will Be 40*.

that work levels would return to a more sustainable level; which they did in April 2010. Mr Kelly says that Mr Brand was aware of the downturn in the work available and when work was “*light*” in a particular week, Mr Kelly asked Mr Brand if he would be willing to take some time off, either without pay or on annual leave. Mr Kelly says that Mr Brand was “*enthusiastic*” about the prospect of voluntarily reducing his hours during the summer as he was “*keen*” to spend some time with his two children; but he did not wish to take an advance on his annual leave entitlement. Mr Kelly says that he was “*grateful*” for Mr Brand’s agreement to reduce his hours during the period of the downturn in work and because of Mr Brand’s “*enthusiasm*” Mr Kelly believed this was a “*temporary win-win arrangement.*” Mr Kelly says that given the “*positive response*” of Mr Brand in regard to working reduced hours during the summer weeks, it came as a surprise to Mr Kelly to see in the *Statement of Problem* that it was now an “*issue*” for Mr Brand. However, I note that in a letter dated 20<sup>th</sup> April 2010, whereby Mr Feist raised a personal grievance on behalf of Mr Brand, both the issue of Mr Brand’s dismissal and the reduction in the hours of work were raised; albeit in regard to the latter, it was submitted that Mr Brand’s hours “... *were cut from full time to twenty hours or less ...*” The evidence shows this clearly was not true regarding the extent of the reduction.

[7] The evidence of Mr Brand is that he did not agree to take time off without pay and he says that there was no discussion about this or him wishing to have time with his children; and as they are teenagers and full time students, he did not see them during the day in any event. Mr Brand says that there was only a “*small reduction*” in the hours of work at the beginning of the year but this increased from March 2010. Mr Brand says that this was because the business purchased a computer numerically controlled (CNC) machine in February 2010. This machine can produce wood products via a computer controlled system. The machine requires a specialist operator and a new employee (Brandon), was employed accordingly. Because Brandon was assembling the cabinets that the CNC machine produced, Mr Brand says that the effect was a further reduction in the hours of work for him. But the evidence of Mr Kelly is that Brandon actually worked fewer hours than Mr Brand and further, the “*voluntary reduction*” in Mr Brand’s hours of work was not influenced by the employment of Brandon as a skilled CNC operator. Mr Brand also says that he could have operated the CNC machine, if he had been trained, but I find that proposition to be unrealistic given the evidence of Mr Kelly that even he did not feel confident about

initially operating a machine that cost \$250,000. Further, given the cost of the machine, Mr Kelly says it needed a skilled operator “*from day one*” and this is why Brandon was employed.

[8] The further evidence of Mr Brand is that he raised the issues about the reduction in his hours of work “*on a number of occasions.*” In a response to a question from the Authority, Mr Brand said he raised the matter on “*two occasions*” and upon being asked by Mr Feist to identify when this was, Mr Brand said it was: “*the end of February/early March.*” Mr Kelly denies that Mr Brand raised any issue about the reduced hours of work and says if Mr Brand had raised the matter, he [Mr Kelly] would have had to look at some other option. Mr Kelly also says that on quiet days, Mr Brand was always given the option of doing some “*factory hours,*” (which I understood to be general maintenance work) or going home early, and Mr Brand opted for the latter.

[9] Mr Brand has produced three payslips for the pay periods ending 23/03/10, 08/04/10 and 20/04/10; along with bank statements (showing net wage deposits) from 27<sup>th</sup> January to 4<sup>th</sup> May 2010. The evidence of Mr Brand is that his hours of work dropped from “*an average of 55*” each week to 30 hours each week in February, 25-30 hours each week for March, and the same for April 2010. But dividing the net hourly rate (\$19.30 average) into the bank deposits for February results in an average of 37.75 hours worked each week. Applying the same method for the month of March, the average was 34 hours worked each week, and for April, 29.75 hours each week. Not quite as extreme as Mr Brand says, but nevertheless, it has to be accepted, there was a marked reduction in earnings compared to what was available in the first months of his employment

[10] Given the conflict in the evidence between Mr Brand and Mr Kelly, an assessment of the credibility and/or reliability of their respective evidence is required. In the round I prefer the evidence of Mr Kelly overall. There is of course also subclause 6.2 of the employment agreement whereby:

Where a downturn in business results in an insufficient amount of work, the company may reduce the number of [sic] employee’s ordinary hours as an alternative to redundancy or staff reductions and the employee will be paid the normal wage or commission at the appropriate prorata rate.

Mr Kelly says that he did not have to rely on this clause, as the agreement with Mr Brand to take time off was reached in “*an informal sense*” and was “*almost more of a favour than anything.*” I accept that this is so, but on the other hand, perhaps Mr Brand never envisaged that the reduction in the hours of work would continue or that he would incur an ongoing loss of earnings for as long as he did. But in the absence of tangible evidence to the contrary, I am left to conclude that it is more probable than not, that Mr Brand did not raise any real objection to working reduced hours while he was employed.

[11] Therefore, on the balance of the evidence, I find that Mr Brand did freely agree to work reduced hours when there was a downturn in work and I accept the evidence of Mr Kelly that Mr Brand was happy to work less hours during the summer. Indeed, it seems that Mr Brand’s concerns pertaining to the reduced hours of work only appeared subsequent to his dismissal, as evidenced, in a tangible sense, for the first time via the personal grievance letter dated 20<sup>th</sup> April 2010. While it has to be accepted that the reduction in working hours and associated income were a disadvantage to Mr Brand in his employment, I do not accept that the disadvantage was brought about by an unjustifiable action by his employer. Rather, I find that Mr Brand was aware of a downturn in the amount of work available from January 2010 and that he, more probably than not, willingly accepted the reduction in working hours over the summer period. But even had this not been so, I conclude that subclause 6.2 of the employment agreement would have permitted the reduction in working time in any event, provided that good reason for such existed due to an insufficient amount of work, that appropriate prior consultation was entered into and any reduction in working hours was accepted as an alternative to termination of employment on the ground of redundancy.

### **The claim of unjustified dismissal**

[12] On 5<sup>th</sup> March 2010, Mr Kelly wrote to Mr Brand inviting him (and a support person) to attend a meeting on 8<sup>th</sup> March 2010. Mr Brand was informed that the purpose of the meeting was to:

“... discuss the issues surrounding the amount of time taken to install the Hanning kitchen.

The outcome of the meeting was that Mr Brand received a written warning dated 9<sup>th</sup> March 2010, the substance of which follows:

After carefully considering your explanations of the events we feel we have no other choice apart from to issue you with a written warning. The constant time overruns are costing the company dearly both in lost turn over and having to reassign staff to cover the work schedule. Failure to meet industry job deadlines in the future will potentially result in another written warning. Continued failure after this could result in your employment contract being terminated. We value your employment and would like to take this opportunity to offer you more training should you think it would be beneficial to resolving this issue. If you would like to discuss the issue further we once again would be more than happy to meet with you and a support person of your choosing.

Mr Brand signed the warning confirming that:

I understand the above letter & all its implications. I will endeavour to work towards resolving the issues above.

[13] Regrettably, further issues relating to Mr Brand's work performance arose and via a letter from Mr Kelly dated 22<sup>nd</sup> March 2010, he was invited to attend a meeting to discuss "the amount of time taken" on six identified projects and the finished quality of the jobs "in general." The outcome of the meeting was that Mr Brand received a further written warning dated 24<sup>th</sup> March 2010; the content of which is similar to the earlier warning with the addition of:

The constant time overruns are costing the company dearly in lost turn over and having clients verbally complain about your finished jobs and refusing to accept them is unacceptable. We have now had to send tradesmen back to three of your jobs to finish them to an acceptable standard. Continued failure to meet an industry standard finish in the future will potentially result in your employment contract being terminated as outlined in your previous warning dated 9/3/10.

Mr Brand was again offered more training if he thought it would be beneficial.

[14] Via a letter dated 6<sup>th</sup> April 2010, Mr Brand was invited to attend a meeting on 8<sup>th</sup> April 2010 (this subsequently changed to 12<sup>th</sup> April) to discuss the issues pertaining to the time taken working on two identified projects, in addition to a written complaint from a client. Mr Brand was informed about the "serious nature" of the meeting and the potential for his employment to be terminated, given the previous two warnings. Mr Brand and Mr Kelly have given evidence about how the meeting proceeded and the matters that were discussed. Mr Kelly explained that there were "*big issues*" in regard to the over run of time on the jobs in question while Mr Brand disputes that the time over runs were as bad as portrayed by Mr Kelly. Mr Brand also says that he was not at fault in regard to some of the problems that arose.

[15] Having heard from Mr Brand, the outcome of the meeting on 8<sup>th</sup> April 2010 was that Mr Kelly made a decision to terminate the employment of Mr Brand. This decision was recorded in a letter dated 24<sup>th</sup> March 2010. But Mr Kelly acknowledges that the date is wrong and it seems that the earlier warning letter of that date was used as a template without the date being changed; albeit Mr Brand mistakenly states that he received the dismissal letter on 24<sup>th</sup> March 2010. It seems that the correct date for the letter most probably should have been 9<sup>th</sup> April 2010. The letter records that:

Please be advised that I have reviewed the facts surrounding the meeting we had at 7.15am 12<sup>th</sup> April. As I am sure you remember the discussion was the serious nature of the quality of your finished product along with the constant time over runs experienced on your jobs. After carefully considering your explanations of the events we feel we have no other choice apart from to terminate your employment as per section 16 of the [employment] agreement.

Mr Brand was given two weeks notice which he worked out.

### **The reasons why Mr Brand says the dismissal was unjustified**

[16] Firstly, it is submitted for Mr Brand that the warnings “lack sufficient substance” to be “genuine.” But on the weight of evidence, I find that proposition to be unsustainable. Indeed, Mr Brand never took issue with the warnings while he remained employed and in fact signed an express acceptance of the first warning. I find that both of the warnings issued to Mr Brand were for good cause – that is – that the work carried out by Mr Brand was not completed within, or even close to, the reasonable industry time frames allowed, and in some cases, the quality of the finished work was not up to an acceptable standard. I accept the evidence of Mr Kelly that while Mr Brand held himself out to an experienced tradesman and he was given some time to prove this was so, it subsequently transpired that Mr Brand was unable to complete some of the projects he was assigned, on time or with sufficient quality. I find that the warnings issued to Mr Brand were fair and reasonable in the circumstances. Also, Mr Brand was offered further training if he required it, but the evidence of Mr Kelly is that Mr Brand never indicated he needed it and Mr Kelly says that he got the impression from Mr Brand that he had the experience to do what was required.

[17] Mr Brand also says that the “dismissal procedure” was “predetermined” because the employer set out to reduce Mr Brand’s hours of work and then issued him with warnings “to get rid of him.” Mr Brand strongly suggests that the employment of

Brandon as the CNC operator was a turning point in regard to the future of his employment. But I find that none of this is supported by the overall evidence. In regard to the latter point, I am satisfied that the employment of Brandon was largely irrelevant as to whether Mr Brand continued to be employed as clearly the role of CNC operator was a specialised function related to the substantial investment that Mr Kelly had made into his business; and Mr Brand's position was advertised shortly after his dismissal. Neither do I accept Mr Brand's explanation that some of the faulty workmanship originated from Brandon. But even if it were otherwise, the weight of the evidence is that the time over runs and the majority of the faults were, in the view of Mr Kelly, unacceptable and could be reasonably seen to be the responsibility of Mr Brand. And in regard to one particular matter, a client refused to have Mr Brand back on their project.

[18] I find that Mr Brand was fairly put on notice that his work performance was unsatisfactory and that an improvement was required for which further training was offered. Mr Brand appears to have failed to take the opportunity to become more diligent in regard to his work and regrettably, the eventual outcome was his dismissal.

### **The legal test**

[19] The test the Authority must apply is whether the decision to dismiss Mr Brand on the ground of continued and unacceptable work performance was what a fair and reasonable employer would have done in the circumstances.<sup>2</sup>

[20] I accept that Mr Kelly is an experienced tradesman joiner and businessman and he is well capable of assessing whether or not Mr Brand was making a reasonable attempt to improve his performance after being formally warned twice that this was required; and that a failure to do so could result in the termination of his employment. Also, and of particular relevance in this case, it has to be accepted that, particularly in difficult economic times, a small business such as Interno, can stand or fall on its reputation to complete projects at a high level of quality, within a given time frame and within the quotation price allowed. And, that time over runs have a compounding and detrimental effect on other work that is scheduled and the expectations of other

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<sup>2</sup> Section 103A, Employment Relations Act 2000. Given that Mr Brand was dismissed prior to 1<sup>st</sup> April 2011, this is the test that applies, rather than the subsequent test provided by the Employment Relations Amendment Act 2010.

clients. Taking all of this into account, I find that the dismissal of Mr Brand was the action of a fair and reasonable employer in all the circumstances.

### **Determination**

[21] For the reasons set out above, I find that Mr Brand was not disadvantaged in his employment by an unjustifiable action by his employer and hence the claim for arrears of wages also fails. I also find that the dismissal of Mr Brand was the action of a fair and reasonable employer in all the circumstances. It follows that the overall claims of Mr Brand are not successful and they are dismissed.

**Costs:** Given that Mr Kelly, as the Managing Director of the respondent company, acted as the advocate, a consideration of costs is not required.

**K J Anderson**  
**Member of the Employment Relations Authority**