IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 57/10
5154535

BETWEEN	JAMES COULSON Applicant	LEONARD
AND	EZI ROOF NZ LTD First Respondent	
	EZI BUILD NZ LTD Second Respondent	
	JUSTIN THORNLEY Third Respondent	

Member of Authority:	Paul Montgomery
Representatives:	Neville Higgison, Counsel for Applicant Garry Knight, Counsel for Respondent
Investigation Meeting:	11 November 2009 at Christchurch
Submissions Received:	On the day
Determination:	10 March 2010

DETERMINATION OF THE AUTHORITY

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[1] The applicant says he was dismissed from his employment with the respondents without justification following his absence from work after injuring his back while working on a building site. Mr Coulson wants the matter remedied by the payment of sixteen weeks lost remuneration, payment of his holiday, compensation for hurt and humiliation in the sum of $5,000 and costs.

[2] The respondent says the applicant abandoned his employment by failing to respond to Mr Thornley's and Mr Baker's telephone calls and messages over the course of a week. Mr Thornley says he considered "re-employing" Mr Coulson but

the respondent had no suitable work available given the building downturn. The respondents declined to provide the remedies sought.

[3] The matter did not go to mediation as Mr Thornley declared the applicant had abandoned his employment and the company had no case to answer.

Essential facts

[4] Mr Coulson was employed under an individual employment agreement with Ezi Roof beginning work on 15 May 2008 as a full time roofer. He says he was told after a period of time he would be working for Ezi Build. The move to Ezi Build was a gradual process the applicant says.

[5] Mr Coulson says he had been doing a lot of digging on two different sites and believes this caused him to strain his back. On 22 September 2008 Mr Coulson was lifting a frame with another worker when he felt pain in his back and following that spasm *could hardly walk after that.* He spoke with the onsite supervisor, Mr Baker whom, he says, sent him home. Mr Baker agrees and accepts the applicant was in pain however, he says he *picked up chatter on the worksite that Mr Coulson had actually injured his back at the weekend or at the weekend had aggravated an earlier injury. I reported the injury, and my doubts about it to Mr Thornley.*

[6] Mr Baker says he tried to contact Mr Coulson *on several occasions* on the applicant's cell phone. He says the applicant failed to answer the calls or to respond to the messages he had left on Mr Coulson's voice mail.

[7] The applicant says he went to his doctor that day where he was diagnosed as having *lumber strain.* Mr Coulson says he was put off work until 29 September 2008. He says he rang *both Dave (Baker) and Justin (Thornley) when I got home from the doctor.*

[8] Mrs Coulson, the applicant's mother, said she faxed the two medical certificates to the Ezi Build/Ezi Roof fax number on 24 and 25 September respectively. The confirmation sheet confirms the documents were successfully transmitted and to the correct fax number. Mr Thornley belatedly acknowledged in his evidence *I gather that medical certificates were supplied to the office, that Mr Coulson was to be off all work until 29 September. I did not personally see the medical certificates, but accept Mrs Coulson's evidence that they were supplied.*

[9] On 29 September the applicant arrived to work at the Gilby Street site. Mr Baker told Mr Coulson he had been trying to ring him at home and on the cell phone. Mr Coulson says he did get a new cell phone number but that Mr Baker had rung him both on the new cell phone number and his home number before the injury occurred.

[10] Mr Thornley says he tried to telephone the applicant at 4.36pm on 29 September and 3.05pm on 30 September. He got no reply but says he left a messages on each occasion asking Mr Coulson to contact him, but received no contact from him. Mr Thornley says his first contact was made with Mr Coulson when the applicant called at the office *probably about 3 October.*

[11] Mr Coulson says he called to the Gilby Street site on 29 September and spoke to Mr Baker. Mr Baker says he did not. Mr Thornley says Mr Coulson's *certificate exempting him from work ran only to that day (29 September). As far as I am concerned, he was absent without excuse from 29 September to 3 October. I refer to clause 10.1 of the employment agreement, regarding abandonment of employment.*

The issues

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

- Who was the applicant's employer; and
- What was the nature of the employment; and
- Did the applicant provide adequate information to the employer regarding the injury and in the course of his time off work; and
- Did the applicant abandon his employment or was he dismissed; and
- If dismissed, was this justified; and
- If not justified, to what remedies, if any, is the applicant entitled.

The test

[13] The test of justification is set out in the Employment Relations Act 2000, s.130A. This requires the Authority to determine whether a dismissal or action was

justifiable, 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.

Investigation meeting

[14] The Authority heard evidence from Mr Coulson and his mother Mrs Rosalie Coulson on behalf of the applicant. For the respondent evidence was given by Mr Thornley and Mr Baker.

[15] The meeting was relatively straightforward and completed inside three hours. The Authority thanks those who gave evidence and counsel for their brief submissions which I have considered in preparing this determination.

[16] Having had the opportunity to observe all witnesses under questioning where issues of credibility arose I have preferred the evidence of the applicant and his mother over that of Mr Thornley and to a more limited extent, of Mr Baker.

Analysis and discussion

[17] In his submission Mr Higgison urged the Authority to pierce corporate veil and find it was Mr Thornley who was, in truth, Mr Coulson's employer. Mr Knight resisted that approach submitting the companies are not a facade but registered entities in their own right and that lifting the veil was not required.

[18] I agree with Mr Knight on this point, there is no need to lift the veil at all. It is clear on the facts that Ezi Roof employed Mr Coulson, and paid him according to the respondent's evidence, from beginning until 7 September 2008. Mr Thornley's evidence at the investigation meeting was that the final wages cheque was from Ezi Build which in fact establishes nothing.

[19] I find Mr Coulson was employed throughout by Ezi Roof and frequently deployed undertaking tasks for Ezi Build, a sister company. Nor do I accept the respondent's assertion (statement in reply) that Mr Coulson's employed was casual. The employment agreement states: *[The agreement] will come into force on 28 February 2008 and will remain our agreement until it is replaced or either or us terminates the employment.*

[20] At clause 4.1 of the agreement it reads:

> *Subject to clause 4.2 your normal hours of work shall usually be 40 hours per week to be worked on any days of the week but usually Monday to Friday … Your normal hours of work will be from 7.30am to 5.30pm which equates to 47.5 hours a week. The hours will vary accordingly in relation to the project that we have on the go. Your hours of [work] will be relevant and in accordance with the amount of work we have on the books. If we do not have any work for you then you will be sent home without pay.*

[21] Clause 4.2 states:

> *Due to health and safety provisions during inclement weather conditions it is unsafe for normal business activities to continue. In such an event where we are unable to work you will be stood down without pay until conditions make it safe to recommence operations.*

[22] Clearly, these are not terms of casual employment.

[23] Further, the Authority accepts the documentation presented by Mrs Coulson regarding the information sent to the company's fax number. In his evidence, Mr Thornley attempted to place the blame for his not sighting the medical certificates on an employee by the name of Benjamin. Regardless of this I do not accept Mr Thornley's evidence when he states *his medical certificate exempting him from work ran only to that day. As far as I am concerned, he was absent without explanation from 29 September to 3 October.* This is in direct contradiction of his evidence at para.6 when he said *I did not personally see the medical certificates.* It raises the question as to how Mr Thornley could come to the conclusion Mr Coulson had abandoned his employment when at the time, he did not know when the medical certificate expired. This appears to be a case not of the poor workman blaming his tools but rather the poor manager blaming his administration staff.

[24] In his verbal evidence to the Authority in response to questioning Mr Thornley said that work was starting to dry up and that had he continued or re-employed, to use his terminology, Mr Coulson, there would probably only have been a month or so work available to him.

[25] In his submission Mr Knight accepted that the severance was not an example of best practice however, he urged the Authority to put little weight on this issue. I am not persuaded by this submission. However, I have given some weight to his submission regarding the lack of forward work available to the company.

[26] In the circumstances facing it, a fair and reasonable employer would not have leapt to invoke the abandonment clause, but would have convened a meeting to clarify all the issues before making a decision regarding Mr Coulson's future. That meeting might have canvassed the dwindling forward work and thus the prospects of limited ongoing employment. Mr Thornley's failure to take this course of action is not simply a lack of best practice, it is fatal to the respondent's defence.

[27] A further matter. Ms Ayeisha Masters, the director and shareholder of Ezi Roof Limited, states in her statement in reply *Ezi Roof is no longer trading and ceased trading on 13/3/09.*

[28] The Authority is sceptical of this assertion. The company, as at 9 March 2010 is still registered at the Companies Office, and at 9.10am on 8 March 2010, the member involved in this matter observed the company's utility vehicle delayed by roadworks in Rutland Street, St Albans, between Mays and Weston Roads. The rack was carrying new ridge capping and the trailer, sheets of new corrugated iron.

Determination

[29] Returning to the issues set out above in this determination I find:

- Ezi Roof Limited was the employer of Mr Coulson.
- Mr Coulson's employment was permanent until either party terminated the agreement.
- The applicant complied with his obligation to provide adequate information to the employer regarding his progress with the injury during the time he was off work.
- The applicant did not abandon his employment, he was dismissed.
- The applicant's dismissal was unjustified and I now turn to the matter of remedies.

Remedies

[30] At the time of lodging this matter with the Authority the applicant sought 16 weeks lost remuneration. However, in his submissions establishing quantum claimed

at the close of the investigation meeting, Mr Higgison said that in fact his client had been out of work for 27 weeks.

[31] In determining the issue of lost remuneration I have had regard to Mr Knight's submission in respect to lack of forward work. I have also considered Mr Thornley's evidence on this point.

[32] On the balance of probability I think it unlikely the company would have been able to provide more than limited ongoing work.

[33] Section 128 of the Employment Relations Act 2000 states:

> *Reimbursement*
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> *(1) This section applies where the Authority or the Court determines, in respect of any employee, -*
>
> *(a) that the employee has a personal grievance; and*
>
> *(b) that the employee has lost remuneration as a result of the personal grievance.*
>
> *(2) If this section applies then, subject to sub-section (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided in s.123, order the employer to pay the employee the lesser of the sum equal to that lost remuneration or to three months ordinary time remuneration.*

[34] Owing to the probability that Mr Coulson's employment may have been of only short duration, I decline to apply the discretion available to the Authority or the Court under sub-section (3).

[35] The respondent is to pay the applicant under s.123(1)(b) thirteen (13) weeks wages calculated on his average weekly earnings while employed, that is $424.46 gross per week.

[36] In his evidence to the Authority Mr Thornley said *I accept that Mr Coulson is due final holiday pay, shared pro rate between Ezi Roof and Ezi Build, and final wages up to 22 September from Ezi Build.* At the investigation meeting Mr Higgison helpfully quantified the holiday pay due at $916.83 gross up until 22 September 2008. The unpaid wages for the final period preceding Mr Coulson's dismissal are to be agreed between counsel for each party.

[37] In respect of the unpaid holiday pay and final period of work payment, the respondent is to pay the applicant interest from 22 September 2008 through until the date of payment at the rate of 4.49% pa.

[38] I order the respondent to pay the applicant the compensatory sum under s.123(1)(c)(i) of the Act of $3,500 without deduction.

Costs

[39] Costs are reserved. The parties are to attempt to resolve this issue between themselves. If this is not possible Mr Higgison will have 14 days in which to lodge and serve his memorandum. Mr Knight will have a further 7 days in which to lodge and serve his memorandum in reply.

Paul Montgomery
Member of the Employment Relations Authority