IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 57
5442817

	BETWEEN	ROBERT MALCOLM FLETT Applicant
	A N D	HIGGINS COATINGS PTY LIMITED Respondent
Member of Authority:	James Crichton	
Representatives:	Applicant in person Michael Quigg, Counsel for the Respondent	
Investigation Meeting:	15 December 2014 at Auckland	
Date of Determination:	23 February 2015	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Flett) alleges that he was disadvantaged by unjustified actions of his employer and unjustifiably dismissed and subject to a breach of his contract by the respondent employer (Higgins).

[2] Higgins denies all of Mr Flett's allegations, maintaining that the dismissal was justified because of misrepresentations by Mr Flett at the time of his engagement, and denying Mr Flett's various allegations of disadvantage by unjustifiable action and breach of contract.

[3] Mr Flett was employed by Higgins on 8 May 2013. Higgins is a painting company and Mr Flett was employed as a painter. A written employment agreement was provided and duly signed by the parties.

[4] As part of the recruitment process, Mr Flett along with all other applicants for employment by Higgins completed a form headed *"Employment details"*. Critical to

an understanding of one of the issues between these parties is a response made by Mr Flett on that employment details form. Against the statement *"Trade Papers/ Apprenticeship Completed"* Mr Flett had ticked the box for yes but below that had written in his own hand *"industrial rope access – working on ropes – level 3"*. Mr Flett's evidence is that in ticking the yes box he was not claiming to be a tradesman painter but was in fact claiming to have the industrial rope access qualification instead.

[5] When Mr Flett had his engagement interview, he was interviewed by Mr Peter Lysaght for Higgins who did not give evidence before the Authority. Mr Glenn Richards, a senior manager with Higgins, did give evidence for Higgins and indicated that Mr Lysaght would have agreed to accept Mr Flett as an employee if he was a fully qualified painter. Mr Flett maintained in his evidence that he had never contended that he was a fully qualified painter and had only ever claimed to be a qualified industrial abseiler and not a qualified painter although he said that he had 1,500 hours of painting experience. That 1,500 hours of painting experience, however seems, by common consent, to have been relatively specialised because it was all carried out at height and so the experience would have been limited to what Mr Richards called *"sectional repainting, rolling out pillars and spandral panels"*. In particular, Higgins maintained that Mr Flett had limited experience of interior painting and that seems to have been accepted.

[6] In any event, Mr Flett denied that Mr Lysaght had ever made clear to him that the company required to engage only tradesman painters and Higgins' evidence was that its interpretation of Mr Flett's employment details form was that he was both a tradesman painter and a qualified industrial abseiler.

[7] The employment agreement covering the employment relationship between the parties contained a guarantee of work of 32 hours per week.

[8] This provision was in place because of the disruptive effects of inclement weather on outside painting projects. In effect, the employer was warranting that, notwithstanding weather delays and disruption, 32 hours work per week would be offered where employees made themselves available. This was achieved by having employees washing surfaces in preparation for painting (which can be done during inclement weather) and, where such work was available, painting interior surfaces.

[9] Mr Flett's evidence is that notwithstanding that guarantee of 32 hours work per week, he was not offered 32 hours work on some weeks and was actually forced to take annual leave on occasions in order to make ends meet.

[10] Higgins denies the allegation that it failed to fulfil its contract obligations in this regard. Its position is that the work was offered to Mr Flett in accordance with the terms of the employment agreement but that for various reasons, he simply failed to make himself available.

[11] Then, Mr Flett alleges that he was victimised as a consequence of making a complaint around health and safety. The essence of the complaint was that in a building that Mr Flett was to work on, he identified there was the possibility of asbestos being present. Higgins' position is that when the issue was raised, it checked appropriately, established that there was in fact no asbestos in the building, advised Mr Flett of that fact, and expected that he would simply continue to work, which he did not.

[12] A claim concerning the use by Higgins of Mr Flett's abseiling equipment was raised initially but subsequently withdrawn save to the extent that the depreciation of the equipment (if any) be taken into account in respect to questions of compensation.

[13] Higgins says that there is no contractual basis for the provision by Mr Flett of abseiling equipment to Higgins and while it agrees that Mr Flett did provide his equipment to it, it maintains he did that of his own volition and not at its request. It also maintains that there was no contractual basis for Mr Flett to now claim compensation for any deterioration in the equipment.

[14] On Monday, 16 September 2014, a meeting was arranged between Mr Flett and Mr Richards of Higgins to discuss Mr Flett's painting skills. The evidence shows that Mr Richards had become concerned about Mr Flett's ability as a painter given that Mr Flett had, on the company's evidence, represented that he was a tradesman painter.

[15] Mr Flett's and Mr Richards' evidence diverges in respect to the outcome of this meeting but it is common ground that the employment of Mr Flett by Higgins came to an end as a consequence of the meeting. Higgins says there was agreement that the employment come to an end because of the lack of a tradesman qualification

in painting by Mr Flett; Mr Flett maintains he was dismissed from his employment without his consent.

[16] However, Mr Flett does concede that he asked for a letter from Higgins to be given to WINZ and that the text of that letter, which Mr Flett acknowledges he read, said amongst other things:

> *We both agreed this morning to terminate your contract …*

Issues

[17] It will be convenient if I consider and address the following questions:

(a) Was Mr Flett unjustifiably dismissed;

(b) Is he entitled to any additional payment; and

(c) Was the health and safety issue treated appropriately by Higgins?

Was Mr Flett unjustifiably dismissed?

[18] I am satisfied on the evidence I heard that Mr Flett was not unjustifiably dismissed from his employment.

[19] I reach this conclusion first because I think that the evidence of Higgins is to be preferred about what is likely to have happened at the engagement meeting, second because Mr Lysaght, the Higgins representative who interviewed Mr Flett, had no authority to hire anyone other than painters, third because Mr Flett's payslips always referred to him as a painter and fourth because the specific provisions in the employment agreement clearly spelt out the basis of the employment being a reliance on accurate representations being made by the applicant.

[20] Given the evidence I heard, it seems to be inconceivable that Mr Lysaght, who I have already noted did not give evidence at my investigation meeting, would have not made absolutely clear during the interview that Higgins was recruiting painters, not abseilers. Certainly, Mr Flett's additional skills and qualifications would have been an attraction but the basic business that Higgins was in was that of painting and I am satisfied that any reasonable person looking at the employment details form would conclude that the question about trade papers/apprenticeships completed must relate to painting and not to other qualifications.

[21] Even if that point is not accepted, it still has to be said that Mr Flett's own qualification, while important and appropriate in itself, is not an apprenticeship or a trade qualification in the usually accepted sense. It is a specialist qualification which may well augment a basic qualification, but no more than that.

[22] Higgins said that Mr Lysaght had only authority to hire painters for the very straightforward reason that that was all that Higgins hired. I heard evidence that Mr Lysaght had no authority from Higgins to hire anyone other than painters and given the nature of the industry Higgins was in, that can hardly be a surprise.

[23] Mr Flett acknowledges that he received payslips which recorded his designation as painter and he acknowledges seeing that description and even noting it and he goes so far as to say in his closing submissions that he did think about having the designation changed in the computer system but he did not take that course and certainly never raised it with anybody at Higgins.

[24] The real point is that, if Mr Flett had been in any doubt about the nature of the qualifications that Higgins was seeking to obtain in the marketplace when he was first employed (and that is not accepted either by Higgins or by me on the evidence I heard), the issue should have been clarified for Mr Flett when he got his first payslip recording his position as a painter.

[25] Even if he were confused about the position from the employment interview, the receipt of his first payslip ought to have put him on notice that he and Higgins were at cross purposes.

[26] Finally, I note that the employment agreement between the parties contains two relevant provisions. The first is a warranty that representations made by the employee at interview are true and correct and that there are no matters that would interfere with the employee's ability to perform their duties other than those that were disclosed. Further, the clause goes on to provide that Higgins places reliance on the representations (or the lack of them) and that it can take disciplinary actions if those representations are inaccurate or incomplete. That is a very clear signal of Higgins' position and more importantly, a contractual basis for the action it subsequently took in relation to Mr Flett.

[27] Moreover, a declaration clause in the employment agreement towards the end of the document makes clear that the employment is conditional on the employee

being fit and able to perform their duties and that in executing the document the employee is not aware of any circumstances that would interfere with the employee's ability to do the job.

[28] Again, any reasonable person reading that clause would conclude that if there were any circumstances which might place one in a position of not being able to perform to the standard a reasonable person would expect, then the contract could be avoided.

[29] Mr Flett's position is plain on the evidence that he did not intend to mislead Higgins. This is not a case where Mr Flett deliberately maintained that he had a tradesman qualification as a painter when he did not; what Mr Flett maintained was that he had the equivalent of a tradesman qualification, not in painting but in abseiling and he stoutly maintained throughout the investigation meeting that he had completed the form, Employment Details, correctly by first ticking the yes box claiming an apprenticeship and then annotating underneath the qualification that he undoubtedly does hold in commercial abseiling.

[30] But even that approach does violence both to Higgins' legitimate requirements and the terms of the employment agreement to say nothing of the evidence from Higgins about what Mr Flett was told at interview and the annotation on his payslip which he seems to have noticed but simply put from his mind.

[31] As I have already made clear, I am satisfied that the qualification that Mr Flett does have (and about which there is no dispute) is not of itself an apprenticeship and therefore in ticking yes to the statement that he had trade papers/apprenticeship, he may not be deliberately misleading Higgins but certainly it was misled.

[32] Higgins thought it was recruiting a tradesman painter with additional qualifications in abseiling; I accept that Mr Flett, for whatever reason, ignored the emphasis on painting as the underlying trade and simply relied on selling his abseiling skills which are undoubted.

[33] But if Mr Flett was left in any doubt about the matter after the initial interview (and I cannot accept that based on the evidence I heard from Higgins, evidence which effectively emphasised that Higgins only employed tradesman painters or potentially apprentice painters), and that Mr Lysaght would have, as part of his invariable practice, made it clear that that was the position, Mr Flett ought to have been put on

notice that there was at best an innocent misrepresentation as soon as he got his first payslip. That records him as a painter which he plainly is not. It is true that he had some 1,500 hours of painting experience, but it is common ground, as I have already noted, that most of that experience was painting outside.

[34] Even if there were an innocent misrepresentation, and nothing that happened at interview put Mr Flett on notice that he was misrepresenting his position and that the company wanted painters rather than abseilers (a conclusion the evidence does not support), and that he did not notice the designation on his payslip (and that is inconsistent with his own evidence), the employment agreement is absolutely clear that if the employer has been misled (as is the case here), then it is entitled to undertake disciplinary action.

[35] That is effectively what happened at the 16 September 2014 meeting. Higgins was not satisfied that Mr Flett had the requisite skills to do the job it had hired him for and, as a consequence, it chose to bring the employment to an end.

[36] The question of whether Mr Flett agreed to the dismissal or not is somewhat academic because I am satisfied on the basis of the conclusions I have already made that Higgins could justifiably dismiss Mr Flett on the basis of the contractual provisions, but for the avoidance of doubt, I think it more likely than not that at the time, Mr Flett did consent to the dismissal on the basis that he was satisfied that he had innocently misled Higgins about his professional qualification. I formed a positive view of Mr Flett at the investigation meeting and do not think that he was a deliberately dishonest person and that being my view of him, I think it more likely than not that he would have conceded the point at the 16 September 2014 meeting that there had been an innocent misrepresentation. That conclusion is further supported by the text of the letter that Mr Flett sought from Higgins to give to WINZ, which included a clear reference to the nature of the end of the employment and in particular, the fact that the termination of the employment had been by agreement.

Is Mr Flett entitled to any additional payments?

[37] I have carefully reviewed all of the evidence before me in respect to Mr Flett's contention that the 32 hours guaranteed employment was not provided to him in accordance with the employment agreement and therefore that Higgins breached the terms of that employment.

[38] There are five weeks where the parties are still in dispute, that is there are five occasions where Mr Flett says that Higgins failed in its contractual obligation to provide him with 32 hours work or more in the week in question. The first of those weeks is the week ending 16 July 2013. In respect to this first week in dispute, the argument centres on Thursday of that week which was 11 July 2013. Mr Flett says he should have been paid for that day because he was ready, willing and able to work; Higgins says that in fact Mr Flett did not attend work that day and therefore is not entitled to payment. Having considered the evidence before me, I am satisfied that Higgins' evidence is to be preferred so that claim by Mr Flett falls away.

[39] The second week in dispute is the week ending 6 August 2013 where again there is a claim from Mr Flett for an additional 8 hours pay having already been paid for 24 hours for that week. Two days are in contention here, Tuesday and Friday of that week. Mr Flett regularly did not work on Tuesdays because he had a previous longstanding commitment. Higgins assumed that longstanding commitment applied on this week and was never told otherwise by Mr Flett. Mr Flett also did not make himself available for work on Friday, 2 August 2013 and on that footing Higgins says there is no entitlement.

[40] The evidence for Mr Flett is simply that he was available to work but it is difficult to square what he says with Higgins' very clear evidence that it did not know that he was available to work. In the absence of evidence that he sought to work and that Higgins ignored that request, it is difficult to see how Mr Flett can be entitled to additional payment. It is plain that the entitlement exists only where the company is aware that the employee is ready, willing and able to work. The fact that there is evidence from Mr Flett that he was available to work does not satisfy the test unless there is evidence that he told the company that and that Higgins ignored that advice.

[41] Week three is the week ending 20 August 2013 where there is another claim for 8 hours short paid. Despite Mr Flett's closing submission seeking payment for an additional 8 hours for this week, his written brief to the Authority agrees that he is not entitled to an additional 8 hours for this week and accordingly I do not take that claim any further.

[42] Week four concerns the week ending 27 August 2013 where there is a claim for 16 hours short paid. Again, the issue here is that the evidence for Higgins is that Mr Flett made no contact with the employer on the days that he was not paid for and

on that footing, he is not entitled to receive the guaranteed minimum weekly payment. Clearly, a contract of employment is a bilateral arrangement requiring good faith and open communication at all times. I am satisfied on a proper construction of the provision in the employment agreement that the employer is not required to pay the guaranteed weekly minimum payment where it is not aware that the employee is ready, willing and able to work.

[43] The final week in dispute is the week ending 17 September 2013. Mr Flett's claim is for an additional 24 hours for that week. That claim was accepted by Higgins at the investigation meeting and that payment will be made by Higgins in consequence.

[44] With the exception of the additional 24 hours pay due to Mr Flett for the final week in dispute, I have not been persuaded that he is entitled to any other payments in respect to the guaranteed weekly minimum.

[45] The final issue to be considered under this subheading concerns annual leave. Both parties now accept that annual leave payments have been correctly made for the ordinary wages paid by Higgins to Mr Flett during the employment. However, Mr Flett is due holiday pay in respect to the final week's pay where there, by common consent, has been a shortfall in payment.

Was the health and safety issue dealt with appropriately?

[46] As I have already noted, Mr Flett raised anxieties about health and safety issues in respect to a particular project. He now says that the issue was about the adequacy of dust inhalation prevention generally, but Higgins is adamant that at the time, all that Mr Flett was concerned with was the possibility of asbestos dust. I make the obvious point first that employees are entitled to engage with their employer in respect to health and safety concerns and that provided those engagements are done sensibly and respectfully, there can be no criticism whatever of an employee's desire to protect himself and/or his workmates.

[47] However, in this particular case, even Mr Flett acknowledges in his evidence that he went too far in the way in which he raised this particular issue and Mr Flett himself says in his final submissions that the way that he dealt with the matter was *"brash"* and *"not the best way to go about raising my concerns"*. I agree.

[48] However, the short point is that having raised the matter, albeit inappropriately, what Higgins immediately did was satisfy itself by engaging with the building owner that there was no risk to the health of their employees and it provided that response to Mr Flett as soon as it got it.

[49] Accordingly, I am satisfied that there can be no criticism of Higgins in respect to its response to Mr Flett's concern nor can there be any criticism of Mr Flett in raising the issue although it is apparent that even he acknowledges that the way that he raised the issue was inappropriate.

Determination

[50] I have not been persuaded that Mr Flett has any viable personal grievance either in respect to unjustified dismissal or in respect to any disadvantage caused to him by the unjustifiable actions of his employer although I have recorded the effect of agreements already reached between the parties that Mr Flett is entitled to additional wages and to holiday pay in respect to those additional wages. Nor have I been persuaded there is any breach of the employment agreement.

[51] Higgins is asked to attend to the payments agreed to Mr Flett, as a matter of urgency.

[52] Despite the factual difficulties with some of this claim, it is appropriate that I record my gratitude to the parties for the respectful way in which they treated each other during the course of my investigation.

Costs

[53] Costs are reserved but I observe that while Higgins has been substantially successful, save for the concessions it has properly made itself, and in accordance with the usual rules, it could look to Mr Flett for a contribution to its costs.

[54] If the matter comes before me for costs to be fixed in the Authority, I can indicate that I am duty bound to consider Mr Flett's personal circumstances, which are well known both to the employer and to the Authority because of the material that

has been filed concerning Mr Flett's financial circumstances, and it may be that Higgins takes the view that this is not a matter that requires it to seek any contribution to its costs from Mr Flett.

James Crichton
Member of the Employment Relations Authority