

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Andreas Gutwin (Applicant)
AND The Fletcher Construction Company Ltd (Respondent)
REPRESENTATIVES Andreas Gutwin In person
Paul Tremewan, Advocate for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 1 September 2005
SUBMISSIONS RECEIVED 1 September 2005 from Respondent
15 September 2005 from Applicant
FURTHER INFORMATION RECEIVED 3 October 2005
DATE OF DETERMINATION 18 November 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Andreas Gutwin was originally employed by Fletchers Development and Construction Limited at Kawerau Mill as a Foreman. In 1989 Holmans, a division of The Fletcher Construction Company Ltd (Fletcher Construction) became the new employer. In 1990 Mr Gutwin was promoted to project foreman. In 1991 when the rest of his gang were made redundant, Mr Gutwin remained in his employment as project foreman.

[2] In 2000, when the work at the Tasman site in Kawerau became slow, Mr Gutwin was invited to work at the Rotorua site. It was common ground that the foreman's role in Rotorua was more labour intensive than the role he had undertaken at Kawerau.

[3] In August 2000 Mr Gutwin suffered a work related injury and returned to work on 4 December 2000 undertaking light duties. In 2001 Mr Gutwin suffered a non-work related injury and has been unable to return to work as a result of Fletcher Construction maintaining that no light duties are available.

[4] Mr Gutwin says he has been cleared to return to work on light duties since March 2002 and that the failure by Fletcher Construction to allow him to do so gives rise to a disadvantage grievance. Alternatively Mr Gutwin says his position at Kawerau was made redundant. Mr Gutwin confirmed at the investigation meeting that the resolution he is seeking is to return to his job or be paid redundancy compensation.

Mr Gutwin's employment

[5] It was common ground that at the time Mr Gutwin commenced employment he was employed to work at the Kawerau site. In 1994 a letter to Mr Gutwin confirms the terms and conditions of his employment. That letter confirms that the location of Mr Gutwin's work is ...Waikato/Bay of Plenty... Fletcher Construction says this allows Mr Gutwin to be employed at any site within the Waikato/Bay of Plenty area. I accept that Mr Gutwin's conditions of employment allowed for his employment to be within the specified region. This is consistent with Mr Gutwin transferring to the Rotorua site, with his agreement, after work fell off at Kawerau.

[6] Mr Gutwin was working at the Rotorua site when he suffered his non-work related injury.

ACC

[7] Mr Gutwin says that in March 2002 he received a clearance to return to work to undertake light duties. Fletcher Construction have consistently maintained that it does not have light duties available and were not prepared to have Mr Gutwin back at work until he was able to provide a clearance to return to his full normal duties.

[8] Mr Gutwin is 67 years old and has been off work for four years. In an assessment of Mr Gutwin's situation, in January 2002, ACC set out Mr Gutwin's vocational history:

[Mr Gutwin] states that he has always worked as a builder, from the age of 16. He has been employed by Fletcher's Building for the last 18 years, and is still currently employed within this company. His job title is Supervisor or Construction Foreman. [Mr Gutwin] states that his job involves working for 9 hours a day, 5 days a week, and involves physical demands such as lifting building materials and tools, concreting and general heavy labour required in building commercial buildings from scratch. As supervisor, he is also responsible for discussing projects and progress with clients, and supervising up to 20 other builders on a job site. He indicates that he is not required to do any significant amount of paper work, as this is done from the Hamilton branch. [Mr Gutwin] reports that he may be required at times to work independently at a job site, depending upon the size of the job.

[9] In March 2002 an ACC case manager met with Mr Gutwin and a representative from Fletcher Construction to discuss a possible return to work programme. In its report from those discussions ACC states that Mr Gutwin's return to work at that point was hindered by the fact that no work was available in Rotorua. The only work available to Mr Gutwin would require him to travel to Taupo. ACC states that Mr Gutwin was unwilling to travel any significant distances to work and therefore the offer of work in Taupo was not an ideal option. Fletcher Construction told the ACC case manager at that meeting that there was a job commencing in Rotorua in the next couple of months. At the investigation meeting Mr John Henwood, Commercial Manager for the Waikato/Bay of Plenty region of Fletcher Construction told me that the job did go ahead. It appears, however, that at that time no contact was made with either ACC or Mr Gutwin.

[10] In December 2002 Dr David Prestage, a specialist in occupational and musculoskeletal medicine evaluated Mr Gutwin's condition and provided advice to ACC regarding ongoing rehabilitation. Dr Prestage's report was copied to Mr Gutwin. In his report to ACC Dr Prestage recognises that the biggest difficulty for Mr Gutwin is his inability to perform heavy physical types of work. Dr Prestage states that Mr Gutwin is capable of light work that does not involve repetitive and/or heavy lifting, bending or stooping. Dr Prestage suggested 2 options for ACC:

- help Mr Gutwin to find another job that he would be physically capable of; or
- classify Mr Gutwin as a long-term maintenance claimant until he turns 65 in 2003.

[11] Dr Prestage advised ACC that the latter option was his preferred option. Subsequently, this is the option ACC adopted. Again, a copy of this report was made available to Mr Gutwin. Mr Gutwin has never challenged the medical assessment nor the validity of the options outlined by Dr Prestage.

[12] In accordance with Dr Prestage's recommendations, in June 2003, when Mr Gutwin turned 65 he was paid at the rate applicable to his entitlement under guaranteed retirement income instead of the rate paid by ACC. Mr Gutwin did not challenge this change in payment with ACC.

[13] At the investigation meeting Mr Henwood continued to maintain that while Mr Gutwin remained an employee of the company, no light duties were available for him to undertake. When I asked him about the light duties Mr Gutwin undertook in 2000 he conceded that the company treated work related injuries and non-work related injuries differently. He told me this was because Fletcher Construction was an approved employer and met their own ACC payments for work related injuries. Because of that, it was better financially, for the company to get staff back to work

as soon as possible if they were off on work related injuries. It is the view of the company that non-work related injuries had no direct financial impact on the company and therefore, light duties were not available.

[14] Following the investigation meeting I reviewed the file and the documents presented to the Authority. As a result of the specialist and ACC reports provided during the investigation meeting I formed the view that it was necessary for Mr Gutwin to have an independent medical specialist assess his ability to return to work. I directed Mr Gutwin to provide the Authority with a full medical report indicating whether or not he was medically capable of undertaking the full normal duties required in his role as Foreman with Fletcher Construction, which includes an element of physical work. Mr Gutwin has provided the Authority with a copy of a medical certificate which clears him to work on light duties only, for normal hours.

Full and final settlement of matters

[15] Mr Henwood told me that in June 2004 Mr Gutwin received and banked a cheque for \$4,649.55 for long service leave due to Mr Gutwin at the time, and that this cheque was in consideration of a full and final settlement of Mr Gutwin's cessation of employment at Fletcher Construction. Essentially this is an argument of accord and satisfaction. Fletcher Construction must show me that it purchased a release from an obligation, by means of valuable consideration, not being the performance of the obligation itself (*Cabletalk Astute Network Services Limited v Cunningham*, unreported, AC 26/04, 14 May 2004).

[16] Firstly, this evidence is contrary to Mr Henwood's assertion at the investigation meeting where he confirmed for me that Mr Gutwin is still employed by Fletcher Construction. He told me Mr Gutwin was ...still on the books... and his job is still available. Also the letter dated 23 April 2004, which he relies on as being the agreement to settle Mr Gutwin's cessation of employment does not constitute an agreement in full and final settlement. Mr Gutwin has never signed the letter and in any event, the payment of the long service leave was an obligation which already existed and can not be used to show valuable consideration in settlement of the differences between the parties.

Has Mr Gutwin suffered a disadvantage?

[17] Mr Gutwin is required to show on the balance of probabilities that one or more of his conditions of employment are affected to his disadvantage by an unjustifiable action by Fletcher Construction (s.103(1)(b) Employment Relations Act 2000).

[18] The Employment Court has found that disadvantage grievances arise out of the employment activity, the on the job situation. The words ...are affected... are related to physical conditions of employment, the environment in which the work is carried out, the amenities and facilities available, the payment to the employee and matters of that kind (*Wellington Area Health Board v Wellington Hotel IUOW* [1992] 2 ERNZ 466).

[19] In determining whether Mr Gutwin's employment was affected to his disadvantage, it is necessary to focus on the employment, considering the changes that occurred and assessing their impact on the employee (*Matthes v New Zealand Post Ltd* [1994] 1 ERNZ 994).

[20] Mr Gutwin was cleared to return to light duties in March 2002. I have concluded that at the meeting in March 2002 it was accepted by Mr Gutwin that he could not return to work at that stage as a result of there being no viable work available for him (he was unwilling to travel to Taupo). The first opportunity for work became available a couple of months later when Fletcher Construction commenced a new project in Rotorua. No contact was made by Fletcher Construction to offer this opportunity to Mr Gutwin.

[21] As a result of Fletcher Construction maintaining there were no light duties available for Mr Gutwin, Mr Gutwin was, in 2003 paid guaranteed retirement income which was considerably less than he had been receiving from ACC. Mr Gutwin, himself, took no steps at that time to raise this with either his employer or ACC.

[22] I am of the opinion that Mr Gutwin has been disadvantaged in his employment by the failure of Fletcher Construction to allow him to return to work, albeit on light duties. It is not enough for Fletcher Construction to simply say there are no light duties for non-work related accidents.

[23] In saying that, I am cognisant of the fact that Mr Gutwin has been off work for more than 4 years and any return to work will need to be managed. Mr Gutwin is still only cleared to work on light duties and is unable to undertake any lifting or other physical work.

[24] Given all of the above, I am inclined to order Fletcher Construction to take Mr Gutwin back to work on light duties. Before that can happen it is prudent to allow the parties the opportunity to discuss and agree how and when Mr Gutwin's return to work can be accommodated.

The parties are therefore directed to attend mediation to resolve the question of how and when Mr Gutwin is to return to work. Mediation is to be undertaken by no later than 16 December 2005.

[25] If the parties are unable to agree on a return to work program for Mr Gutwin, leave is reserved for the parties to return to the Authority.

Redundancy

[26] In 2004 Mr Gutwin discovered that the Kawerau site had been closed when he received a letter from Southern Cross advising him that his premiums were no longer being paid by Fletcher Construction. He then proceeded to contact his employer and requested redundancy on the basis that as he was initially employed at Kawerau and as this site had closed down his job no longer existed.

[27] I do not accept Mr Gutwin was entitled to redundancy compensation in 2004. Mr Gutwin agreed to be transferred from Kawerau to Rotorua at a time when the work in Kawerau was dropping off. It was while he was employed at Rotorua that he suffered his injury. All the reports written by and on behalf of ACC indicate that up until 2004 Mr Gutwin accepted that he was employed in Rotorua.

Arrears of wages – holiday pay

[28] Mr Gutwin claims he is owed payment for annual holidays to which he has become entitled but not yet taken. Payment for outstanding holidays does not crystallise until termination of employment. Mr Gutwin continues to be employed by Fletcher Construction and therefore no holiday pay is due to him until he either takes holidays following his return to work, or when his employment with Fletcher Construction comes to an end.

Mr Gutwin's submissions

[29] Mr Gutwin was invited to file a statement setting out his view of the key points for consideration by the Authority. In his submissions Mr Gutwin makes further claims against the respondent for payment of sums amounting to more than \$54,000. The claims were not properly before the Authority as they were not included in Mr Gutwin's statement of problem. Closing submissions is not the appropriate place for making additional claims. The claims were not part of the investigation process and therefore, I make no findings in relation to them.

Costs

[30] The parties are to attempt to reach agreement on the matter of costs, failing which leave is reserved for the matter to be put to the Authority.

Summary

The Fletcher Construction Company Limited is ordered to allow Mr Gutwin to return to work to undertake light duties.

The parties are directed to attend mediation to resolve the question of how and when Mr Gutwin is to return to work.

Mediation is to be undertaken by no later than 16 December 2005.

Vicki Campbell
Member of Employment Relations Authority