Determination Number: AA 27/02
File Number: AEA 340/01
AEA 413/01

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Anthony Hewitson (Applicant)
AND	Singleton & Hansen (Plumbing) Limited (Respondent)
AND	Singleton & Hansen (Plumbing) Limited (Applicant)
AND	Anthony Hewitson (Respondent)
REPRESENTATIVES	James Parlane, Counsel for First Applicant and Second Respondent) Garth O'Brien, Counsel for Second Applicant and First Respondent)
MEMBER OF AUTHORITY	Rosemary Monaghan
INVESTIGATION MEETING	14 January 2002
DATE OF DETERMINATION	19 March 2002

DETERMINATION OF THE AUTHORITY

Employment relationship problem

Anthony Hewitson says that he was unjustifiably dismissed by his former employer, Singleton & Hansen (Plumbing) Limited ("Singleton & Hansen").

Singleton & Hansen has in turn filed a counterclaim seeking the return from Mr Hewitson of wages it says it has overpaid him. It also says that Mr Hewitson was not dismissed, but that instead he resigned.

Background

Murray and Annette Davidson are the two directors of Singleton & Hansen. In general Mr Davidson takes charge of day to day operations while Mrs Davidson assists with financial and administrative matters.

Mr Davidson interviewed Mr Hewitson for a position as a plumber in April 1994. Two of the matters which were allegedly raised at that time lie at the heart of the claim and the counterclaim respectively in this employment relationship problem.

I deal with the background to the counterclaim first. It is based on an allegation that Mr Hewitson represented to Singleton & Hansen that he was a registered plumber, and on the basis of that representation the company paid Mr Hewitson a higher rate of remuneration than it would otherwise have done. It did so because, at that time, it was applying the rates of pay contained in the expired New Zealand Plumbers and Gasfitters Contractors Award. By 1994 Mr Davidson had increased the actual rates in order to reflect inflation, but maintained the relativities between them. Clause 45 of the expired award included the following rates:

	Per Hour $
"For a Registered Plumber & Gasfitter as defined in subclause 1.7.8 of clause 1	11.09
For a Registered Plumber as defined in subclause 1.7.11 of clause 1	10.87
…	
For a Plumber … who has not applied to the Plumbers, Gasfitters & Drain-layers Board for Registration, but has gained a pass in Trade Certificate in Plumbing or Gasfitting	10.00
For an indentured Plumber & Gasfitter defined in subclause 1.7.13 of clause 1	9.78
…	

45.16 **Payments for registration**

45.16.1 In addition to the wage rates for Plumbers … in the foregoing clauses … a Plumber … who has applied for registration as a craftsman paid the appropriate fee and received his registration as a craftsman shall be paid:

(a) …	
(b) for registration as a Craftsman Plumber or a Craftsman Gasfitter under section 21 or 22 of the Plumbers, Gasfitters and Drainlayers Act 1976 ("the PGD Act")	1.09

45.16.3 In addition to the wage rates prescribed for Plumbers .. a Plumber … who has applied for registration paid the appropriate fee and received his/her registration shall be paid in addition to the rates prescribed in subclause 45.16.1 … $15.22 per week extra. ['the registration allowance']"

A craftsman plumber is registered as such under the PGD Act, and must hold a current plumber's licence under the Act. A registered plumber is registered as such under the PGD Act, and must hold a current plumber's licence under the Act. An indentured plumber is a person who has served an apprenticeship in plumbing and gasfitting, and is competent to undertake certain work provided that a limited certificate has been issued under the PGD Act. As at the date of commencement of his employment at Singleton & Hansen Mr Hewitson had completed an apprenticeship in plumbing and gasfitting, but his licence had lapsed. Accordingly he did not fit within the definition of craftsman plumber or registered plumber. He should probably have been paid as an indentured plumber.

Mr Davidson acknowledged that he did not ask Mr Hewitson about his registered status at the time when he interviewed him. I accept that Mrs Davidson asked Mr Hewitson whether he was a registered plumber and Mr Hewitson replied that he was.

Mr Hewitson alleged that he had been employed as a plumber on a 'limited' registration basis, and that he told Mrs Davidson of his status in the hearing of Gail Bryant who worked in the office at the time. Both women denied that such a

reference was made, and had never heard of a category defined as 'limited' registration. No-one asked Mr Hewitson for a copy of his certification or registration documents, because Mrs Davidson was prepared to take Mr Hewitson's word.

Section 20 of the PGD Act provides for a register of holders of limited certificates. Section 38 of the Act provides for the issue of limited certificates to plumbers allowing them to do sanitary plumbing as defined, but the holder must either work under direct supervision by a craftsman plumber or registered plumber, or in the employ of such a person. In some circumstances direct supervision is obligatory.

In the light of the implications for this on the way an employed plumber works, and because Mr Hewitson's work did not appear to be allocated in the light of such limited registration, I consider it unlikely that Mr Hewitson fully disclosed his status. I consider it likely that when Mrs Davidson asked him whether he was registered, the reply was merely 'yes'.

Thereafter Mr Hewitson was paid as if he were a registered plumber, receiving the base rate for a registered plumber as well as the allowances payable for registration. The company did not become aware of his true status until July 2000, after the Master Plumbers' Association had sought a list of staff and their registration numbers. At about that time Mr Davidson ascertained that Mr Hewitson had not renewed his licence for approximately 10 years. Steps were then taken to obtain registration for Mr Hewitson, and he qualified for registration as a craftsman plumber in February 2001.

Singleton & Hansen seeks in its counterclaim to recover the sum of $19,805.86. The calculation takes into account the difference between the rate for an indentured plumber and the rate Mr Hewitson was paid from the date his employment began until the approximate date of his registration. The figure includes the sum of $4,080.29, being the total registration allowance overpaid.

The background to Mr Hewitson's personal grievance also begins with the 1994 interview.

Mr Hewitson's employment terminated because of Mr Davidson's view that he was doing unauthorised 'homers'. A homer is plumbing work carried out for family and friends on the plumber's own account, rather than through the employer's business.

During the interview the extent of the ability to do homers was raised, and Messrs Hewitson and Davidson had a discussion about the fact that a previous employer of Mr Hewitson's did not allow homers at all. Mr Davidson advised that Singleton & Hansen was a little more relaxed than that, as it allowed homers for close friends and family. Materials could be purchased through the company accounts, provided Mr Davidson's permission was sought first. Homers were to be done outside normal work hours. Mr Davidson did not recall whether he had stated his preference that no money change hands for the labour component of the work, but that aspect was not a key factor in the termination of Mr Hewitson's employment.

At the time Mr Hewitson had a number of personal contacts for whom he did plumbing work, including nurses from the Tokonui Hospital. He described these

contacts as his 'personal following' and it appears that his availability to assist people connected with the Hospital was spread whether by word of mouth or otherwise. Mr Hewitson said he told Mr Davidson he had a following, although Mr Davidson did not remember this.

The incident which led to the termination of Mr Hewitson's employment concerned a quote he had given early in March 2001 to a person for whom he was proposing to do a simple spouting job as a homer. When he called on the client to price the job for her, he found the job was more extensive than she had led him to believe it would be. He gave her a handwritten estimate of $640 for the job, on a plain piece of paper. He said his 'quote book' was in his vehicle.

On or about 12 March 2001 the client, believing the estimate had been provided on behalf of Singleton & Hansen, advised the office administrator, Rita Tootill, that the company's quote for replacing her spouting looked favourable. Singleton & Hansen had no record of the quote and did not take the matter any further. Then on 16 March 2001 the client telephoned the Singleton & Hansen office to say that the job was theirs as set out in the quote. The client was asked to bring the quote into the office, where Mr Hewitson was identified as the originator.

On 19 March Mrs Tootill referred the matter to Mr Davidson.

Mr Davidson took the matter extremely seriously and arranged to meet with Mr Hewitson on 20 March 2001 to discuss it. If the quote was purporting to be a quote on behalf of Singleton & Hansen, then Mr Davidson had responsibility for completing all quotes for the company. However it appeared to Mr Davidson that Mr Hewitson was purporting to quote for work on his own behalf. Once the matter was brought to its attention, Singleton & Hansen put its own formal quote in for the work in question and the quote was subsequently accepted.

During the discussion of 20 March Mr Davidson asked Mr Hewitson for an explanation, and Mr Hewitson replied that the client was 'his' client and he had given her a written quote. There was a conflict in the evidence over whether Mr Hewitson expressly relied on company practice regarding homers, but no dispute that Mr Hewitson referred to the client in question as 'his' client. There was also a conflict in the evidence regarding whether Mr Hewitson acknowledged that he was in a company vehicle or wearing a company uniform at the time when he gave the quote. I accept Mr Davidson's evidence to the effect that such was the case because the way in which the quote had come to the company's attention raised that likelihood very starkly.

There was also a conflict in the evidence over whether Mr Davidson advised Mr Hewitson at the start of the meeting that dismissal was a possibility, and whether during the meeting Mr Hewitson said he would provide a letter of resignation. One of the major issues between the parties concerned whether Mr Hewitson offered a resignation which was accepted, or whether he merely advised that he would think about the matter.

I resolve the matter by saying that, even if Mr Hewitson did offer a resignation which was accepted, Mr Davidson led him to that point. Mr Davidson frankly acknowledged that he was 'gutted' when he found out about Mr Hewitson's quote,

and that he told Mr Hewitson he might as well be in his own business. In his statement of evidence Mr Davidson wrote that after he had indicated to Mr Hewitson that his behaviour was not acceptable, Mr Hewitson: "replied that he would write a letter of resignation and that it would be given to me in a couple of days. I indicated that if he wished to resign I would be happy for this to occur and assist him if I could." In further discussion an agreement was reached which allowed Mr Hewitson to use some of Singleton & Hansen's equipment to assist him to set up his own business.

I have read such written material in the light of the personal attitudes evidenced at the investigation meeting. Thus I conclude that Mr Davidson's anger and disappointment with Mr Hewitson caused him to lead the conversation in the direction of Mr Hewitson's departure to set up his own business and to the resulting discussion about resignation. Thus, at best, if Mr Hewitson offered a resignation on 20 March rather than merely discussing the possibility of doing so, then the resignation was offered in circumstances where it amounted to a constructive dismissal.

On the afternoon of 20 March Mrs Hewitson telephoned Mr Davidson to express a concern about what she saw as her husband's dismissal. The matter was left for further discussion, before Mr Hewitson telephoned on Friday 23 March to say he believed he had been unfairly dismissed.

On 26 March Mr Hewitson reported for work, and asked Mr Davidson to give him a letter confirming that he had been dismissed. Mr Davidson refused to do so. The parties arranged a further meeting to be held on 27 March, and attended by Messrs Davidson, Hewitson, their respective solicitors, Mrs Hewitson and Mrs Tootill.

The meeting was set up on the basis that it would be a disciplinary meeting. Mr Davidson wrote a letter dated 26 March 2001 in which he said he was concerned at Mr Hewitson's misconduct and sought to discuss Mr Hewitson's carrying out work for personal gain, and use of company vehicle to obtain the gain. Mr Hewitson's solicitor wrote to Mr Davidson by letter dated the same date, but I am not satisfied it was received. Mr Hewitson said the solicitor delivered it to Singleton and Hansen, while the solicitor said Mr Hewitson did so 'to the best of my knowledge'. Mr Davidson did not recall seeing it.

During the 27 March meeting Mr Davidson again invited Mr Hewitson to explain his actions in providing the quote in question, and at a time when he was using the company vehicle. Mr Hewitson repeated the explanation that he had his own client base and that the customer for whom he had provided the quote was 'his' client. He said others employed at Singleton & Hansen did homers and he did not see why he could not do so too.

Thereafter the discussion took a downward spiral as Mr Hewitson's solicitor sought a negotiated exit and Mr Davidson raised the concern which has now taken the form of the company's counterclaim against Mr Hewitson. Unfortunately it was apparent that the responsibility for that state of affairs rests with both solicitors. Mrs Hewitson commented at the investigation meeting that she perceived the meeting of 27 March as one in which "most of the time the solicitors were having a go at each other. I have never seen anything like it." I consider it likely that her comment was justified, which is unfortunate but not a matter that can be held against either of the parties themselves.

Because the meeting became heated Mr Davidson said he would consider Mr Hewitson's explanation and advise of his decision the following day. Accordingly on 28 March he telephoned Mr Hewitson to say he believed Mr Hewitson's action in quoting for a client Mr Hewitson considered his own, while in Singleton & Hansen's employ, was serious misconduct. Mr Hewitson's employment was terminated as at 5 pm that day.

Each party has criticised the genuineness of the other's actions. Regarding the real reason for Mr Hewitson's dismissal, the dismissal resulted from his actions in providing a quote to the client and had nothing to do with any rate of pay to which he might become entitled as a result of gaining his registration. As for the counter claim, it was obviously prompted by Mr Hewitson's actions in the circumstances surrounding his dismissal. However that is not sufficient in and of itself to defeat an otherwise valid counter claim.

Determination of personal grievance

At the heart of Mr Hewitson's explanation of his admitted behaviour in obtaining a quote from the client was his allegation that he was doing no more than his colleagues were doing pursuant to the company's policy on homers. He also made a half-hearted attempt in his written statement to say that he was not necessarily proposing to do any of the work himself anyway, but I did not find that proposition credible.

Mr Hewitson recounted an incident in which he sought from Mr Davidson a small part in association with work he was doing helping a friend after working hours. Mr Davidson acquiesced. The request was clearly within the policy Mr Davidson had articulated and it does not support Mr Hewitson's explanation. He mentioned the activities of another employee (now deceased) who carried out work on tenanted premises which the employee owned. The employee's activities were known and he put his materials through the company account. Again there was nothing in that information to suggest a breach of the homer policy. Mr Hewitson also alleged that, several years earlier, an employee was talking about having a whole house to work on, and wondering how he would fit the work in during his weekends. Mr Davidson knew nothing of this.

There may have been scope for abuse of the homer policy but Mr Hewitson was unable to produce evidence of abuse on the part of other employees, or that Mr Davidson was aware of any such abuse but failed to act on it.

Mr Hewitson's own admitted activities went well beyond the activities permitted by the policy. Indeed Mr Hewitson did not attempt a strong argument that the activities were within the policy, relying instead on an argument that the people for whom he did work were 'his' clients. That approach carries the seeds of its own destruction as it is not consistent with his obligation of good faith and fidelity towards his employer.

Accordingly I conclude that the dismissal was justified. Mr Hewitson does not have a personal grievance.

Determination of counterclaim

I dismiss the claim for repayment in respect of the hourly rate of pay on the ground that it is not proved that Mr Hewitson would have been offered and would have accepted the lower rate of pay when his employment began. The possibility of further negotiation remains open. In addition it is not proved that Mr Hewitson would have continued to accept the lower rate, plus an increase at the rate of 2% per annum, in each of the remaining years to which the claim relates. Thus, leaving aside the issue of liability, the quantum of the claim is not and probably cannot be proved. Accordingly that part of the counterclaim is dismissed.

The allowance is a different matter. It was separately identifiable as such from the outset, and was paid at a standard weekly rate that was not the subject of negotiation and remained the same throughout the period relevant to the claim. It was paid to registered plumbers employed at Singleton & Hansen, and with the exception of Mr Hewitson it was not paid to unregistered plumbers. It was paid to Mr Hewitson in error because Singleton & Hansen believed Mr Hewitson was registered. According to the award on which the rates of pay were based, one of the reasons for the existence of the allowance was to cover annual registration fees, which the plumbers remitted themselves. Finally it was separately identified in the company's payslips and pay records.

Accordingly I am satisfied that, if liability exists, then quantum can be proved in the sum of $4,080.29.

I asked the respondent to specify the legal basis for any liability attaching to Mr Hewitson. In response the respondent has relied on the provisions of the Contractual Mistakes Act 1977, on the ground that s 162 of the Employment Relations Act 2000 confers on the Employment Relations Authority the jurisdiction to make such orders as are available under the Contractual Mistakes Act. The law concerning misrepresentation was not relied on.

Section 6 (a) of the Contractual Mistakes Act allows relief to be granted if, in deciding to enter into a contract:

. the party entering into it was influenced by a material mistake, and the other party knew of the mistake; or
. both parties were influenced by the same mistake; or
. both parties were influenced by a different mistake about the same matter of fact or law.

There was no evidence that Mr Hewitson was mistaken about his registered status. Accordingly the second and third of the above alternatives do not apply. Regarding the first alternative, even if I assume Singleton & Hansen decided to enter into the employment relationship under the influence of a mistake that was material to it, I am not satisfied that Mr Hewitson knew of the mistake. He did have a form of registration, but he was not specific about its nature. I do not consider evidence of that kind to be sufficient to fix him with knowledge of any mistake under which Singleton & Hansen was labouring.

Accordingly I conclude that the respondent has not established a legal basis for liability on Mr Hewitson's part. For that reason I dismiss that part of its counterclaim also.

Costs

Costs are reserved.

The parties are invited to reach agreement on the matter themselves. If they are unable to do so they shall have 14 days from the date of this determination in which to file and serve memoranda on the matter. If either wishes to reply to anything in the memorandum of the other there shall be a further three working days from the date of receipt of the relevant memorandum in which to file and serve such reply.

Rosemary Monaghan
Member, Employment Relations Authority