Determination Number: WA 157/06
File Number: 5032222

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY**
**WELLINGTON OFFICE**

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| **BETWEEN** | Damien Hilder (Applicant) |
| **AND** | Dixon and Dunlop Limited (Respondent) |
| **REPRESENTATIVES** | Graeme Ogilvie for the Applicant<br>Shawn Kirby for the Respondent |
| **MEMBER OF AUTHORITY** | P R Stapp |
| **INVESTIGATION MEETING** | Wellington, 1 November 2006 |
| **DATE OF DETERMINATION** | 6 November 2006 |

## DETERMINATION OF THE AUTHORITY

### Employment relationship problem

[1] There are four issues in an employment relationship problem raised in the Authority by the Applicant. First, how did the employment end? Second, was there any breach in regard to the employer providing a safe place of work? Third, was the Applicant entitled to the payment of a $300 bonus? Fourth, how should the matter be resolved? The Applicant is seeking remedies for a personal grievance and payment of the $300 bonus. The Respondent has asked for the matter to be dismissed.

[2] Both parties are seeking costs. The Applicant is legally aided.

### The facts

[3] Damien Hilder commenced his employment with Dixon and Dunlop Limited (the Company or Dixon and Dunlop) on 30 November 2005 as a labourer trainee operator after he had approached Ron Dixon, one of the Company's directors for work. Mr Dunlop offered him work as a favour and because he thought Mr Hilder could do with a second chance since there had been some problems in an earlier engagement with the Company involving another director Alan Dunlop.

[4] Dixon and Dunlop is a business concerned with earthmoving and general contracting. The business is managed by its directors Ron Dixon and Alan Dunlop.

[5] Mr Hilder was employed on $14.50 per hour to work 45 hours per week. He had a written employment agreement. At the time of starting work he was aware of the company's Staff Health and Safety Handbook. No check was made on the currency of his *"Commercial Passport"* that he had received from attending a 'site safe" course and was used by Dixon and Dunlop to meet any safety requirements on other contractors' sites where Dixon and Dunlop would be working.

[6] On Friday 6 January 2006 Mr Hilder and another employee, Andrew Cook, were directed to commence work on a site where there had been an extensive earth slip. It was agreed this was unusual and significantly different work. Prior to starting Mr Hilder helped Ian Montgomery, another employee, clear vegetation and other material at the site, which involved Mr Montgomery using as required a harness and rope.

[7] The work on the site involved a full set of engineering plans and specifications put in place by another company.

[8] Also, prior to the work commencing a "Significant Hazard Identification Form" was completed by the Company (produced during the Authority's investigation meeting). It identified that amongst other things provision for the *"use of ropes/harness as required"* on the site. A harness and at least one rope were provided. There was no actual instruction given to Messrs Hilder and Cook that they had to use the equipment except to rely upon their common sense.

[9] On 7 January Mr Hilder says he went to see Mr Dunlop to complain about the dangerousness of the work. He claims that Mr Dunlop told him: *"If you don't like it fuck off"*. Mr Dunlop denied saying this. Mr Cook says Mr Hilder told him of the conversation straight after it happened and he did not take any matter up himself.

[10] The work on site continued. At one stage while Messrs Hilder and Cook were working dust was thrown back into their faces because of a southerly wind. Immediately upon them requesting Mr Dunlop to provide them with gear he purchased goggles for the workers that they accepted satisfied their request.

[11] On Wednesday 11 January Mr Dunlop offered over the telephone to pay a bonus to Mr Hilder, including Mr Cook, to complete the job before Monday 16 January, when they would be required to move to another site. Mr Dunlop says he offered the bonus on the understanding that the work would be completed and he told the Authority that this would implicitly be without compromising safety. Mr Hilder says the offer was made to complete the work as Mr Hilder says in his evidence *"as best as possible"*. Mr Dunlop says that Mr Hilder's comment does not make any sense.

[12] On Saturday 14 January Mr Hilder was clearing top soil away with a spade when he had to let the tool go and earth dropped away causing Mr Cook to grab him. At this point Messrs Hilder and Cook say that the digger driver stopped work for the day and they followed. Mr Hilder believed he had done all that was required to get the bonus. Mr Cook, the Applicant's witness says he understood he would not get the bonus because they had not completed the work.

[13] On Monday 16 January Messrs Hilder and Cook went to work at another site. Mr Hilder made no further complaint and did not report the incident that occurred on the Saturday. He waited until pay day and finding he had not been paid the bonus says he told Mr Dunlop he had put his life at risk for nothing and that Mr Dunlop said *"If you don't like it fuck off"*. Mr Dunlop denied this and says he said that *"If you are not happy with it, maybe its time you looked for other employment"*, in referring to not paying the bonus. He says that Mr Hilder said *"sweet as and fuck you"*. Mr Hilder denied swearing. He left the work place and did not return. He says he "*quit"* because he did not get paid the bonus. His father later turned up to question the non payment of the bonus. Much later Mr Cook was paid half the bonus in good faith by the Company to stay at work.

**The Authority's decision**

[14] Mr Hilder *"quit"* his job for the reason that he was not paid the bonus. Mr Hilder has not satisfied me that Mr Dunlop said to him *"If you don't like it fuck off"*. Mr Dixon corroborated Mr Dunlop's evidence and was present during the telephone call held on 19 January to hear what Mr Dunlop said. Mr Cook says that initially the phone call involved Mr Hilder getting heated and swearing. He did not hear all what was said by Mr Hilder and had walked away during the telephone call only to return and find the phone on the ground. Even if Mr Dunlop said *"If you are not happy with it, maybe its time you looked for other employment"* in referring to not paying the bonus, this could not be taken by Mr Hilder to reasonably believe he was being dismissed at the

initiative of the employer, I hold. This is because by that time he was working on another site and had made no complaints.

[15] Therefore he has no claim for a constructive dismissal or even an actual dismissal.

[16] Another matter raised by Mr Ogilvie was the employer's alleged breach of safety and that it was unjustified and disadvantaged Mr Hilder, by putting him at risk in his employment. Mr Hilder says that he complained to Mr Dunlop during his employment about the safety. I accept that Mr Hilder went to see Mr Dunlop on the Saturday and that there was a meeting. Mr Cook corroborated that it occurred, but he was not present. Mr Dunlop accepted that he spoke with Mr Hilder. However, it is probable that if any problem existed about the safety Mr Dunlop advised the Applicant that if he found it unsafe not to carry on, or words to that effect. This is consistent with the evidence that Mr Dunlop did not swear as Mr Hilder says. Mr Cook only repeated what he says Mr Hilder told him Mr Dunlop said. He did not directly hear it. Dixon and Dunlop had other work available. It had provided a harness and at least one rope left behind from Mr Montgomery's and Mr Hilder's clearing of the vegetation and other material. Dixon and Dunlop had identified hazards at the site. This is supported by the "Significant Hazard Identification Form" making provision for *"use ropes/ harness as required"*. Messrs Hilder and Cook never complained formally about any issue of safety in regard to access and the height of the site except that they personally found the height difficult. Mr Hilder had an opportunity to raise any matter with Mr Dixon who had employed him but did not do so. Dixon and Dunlop has a Safety and Health handbook that both employees knew about, and procedures for reporting, that both employees ignored. Neither employee reported the incident that occurred on Saturday 14 January. Mr Dunlop immediately provided goggles which Messrs Hilder and Cook accepted upon requesting Mr Dunlop to provide gear to help with the blow back of dust from the southerly wind.

[17] My conclusion is that Mr Hilder has raised the safety matter as an after thought in submitting a personal grievance without any proof of an actual breach of any safety requirements given the provision of at least one rope, one harness, the existence of the Hazard report, the existence of safety provisions and procedures and evidence from a consulting engineer and principal from the other company at the site and his knowledge of the work involved.

[18] Dixon and Dunlop could be criticised for its level of supervision on the site but this would have to be considered in light of the facts that phones were provided, there was some attendance by Mr Dunlop at the site (the amount of time he attended is disputed) and the consulting engineer of

the other company also attended the site, and it is probable that some instruction was given to the two employees. I am satisfied that Dixon and Dunlop attempted to minimise any hazards and this was sufficient to make it probable that there was no breach of its obligations applying to Mr Hilder's claim. Also Dixon and Dunlop could be criticised for the clarity of its reporting procedures and location of accident and near miss report forms and not properly renewing/refreshing Mr Hilder's induction. However I have weighed this with the evidence that Messrs Hilder and Cook had some knowledge of the Company's safety and health handbook and both of them had some knowledge that a person at Dixon and Dunlop was responsible for safety. Also Mr Hilder signed a written employment agreement with a safety provision contained in it.

[19] Mr Hilder's claim cannot possibly succeed when it is apparent that he had been working on another site for four days without any complaint over safety in his decision to *"quit"*. Any comment he had about putting his life at risk was a subjective view with the disappointment of not being paid because he never pursued any complaint that he might have had and did not report the 14 January incident. It makes it even more probable that he was only upset about not being paid the bonus and *"quit"*. In such circumstances Mr Hilder has no claim, I hold.

[20] Mr Hilder is not entitled to the bonus as claimed. This is because it was offered on the basis of the work being completed. The work was not completed, according to Mr Cook. The work they had completed might have meet Mr Smith's requirements but that does not mean that what Mr Dunlop required was carried out. I am further supported in the fact that Messrs Hilder and Cook finished for the day after an incident on 14 January when the digger driver decided not to carry on anymore. That incident was not reported and Mr Hilder finished for the day with the clear implication that in doing so the work was probably not completed. Mr Cook did not expect the payment of the bonus because he knew that the work had not been completed. By the time half of it was paid to Mr Cook later, Mr Hilder had ceased his employment, and it was open to the employer to pay it to Mr Cook as a discretionary payment to stay at work. Mr Hilder cannot claim he has been treated differently when he was no longer employed and a different reason has been provided for paying the sum to Mr Cook. According to Mr Dunlop the payment was made in good faith for Mr Cook to stay at work with Dixon and Dunlop and was only half the sum that distinguishes it from the original offer made to Mr Hilder. Any other reasons for the payment being made have not been explored, or raised by the Applicant.

**Costs**

[21] Costs follow the event. Mr Hilder is to pay the Dixon and Dunlop Limited the $50 contribution he made for legal aid. If he had not been legally aided I would have awarded costs of $2,000 as a contribution to Dixon and Dunlop Limited's costs because this case probably should not have been brought beyond mediation services provided by the Department of Labour. It had a marginal chance of any success including even any arguable case on credibility and the employer has been put to unnecessary costs and expenses.

**P R Stapp**
**Member of the Authority**