

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN David Mosen (Applicant)
AND Anfield Engineering Limited (Respondent)
REPRESENTATIVES David Mosen in person
Stephen Clews for Respondent
MEMBER OF AUTHORITY Vicki Campbell
DATE OF DETERMINATION 12 June 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr David Mosen was employed by Anfield Engineering Limited (AEL) as a welder, to work on a project based in Whangarei, from 17 July 2006 until the completion of the project. Mr Mosen says that a week after he commenced employment, his supervisor, Mr Dean Ratu attended his motel room and advised him that he had not passed a work trial, and he had to be let go. Mr Mosen claims this amounted to a dismissal and that dismissal was unjustified.

[2] It was common ground that Mr Mosen was dismissed due to his poor performance. However AEL says that after discussions and negotiations with the site owners, it was agreed to rescind the decision to dismiss and Mr Mosen was given an opportunity to prove himself. Instead of undertaking the newly agreed work trial he left the worksite on or about 27 July 2006 and did not return, thereby terminating his own employment.

[3] The standard for dealing with alleged poor performance is well-established in case law. A fair and reasonable employer will put the perceived performance problem or problems squarely to the employee. Measures to address the problems will be discussed, along with any assistance needed by the employee, in order to meet necessary targets or outcomes. An employee will be given an opportunity to improve and progress towards improvement will be reviewed with the employee. If the employee fails to improve, and is given an opportunity to explain why expected outcomes were not achieved but cannot adequately do so, the employee may be dismissed. At each stage of this process, the employee will be provided with specific information about the perceived shortcomings and have the opportunity to be accompanied in meetings with the employer by a representative or support person. (*Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659)

[6] The issues to be resolved in this case are:

- (i) was the applicant fairly warned of the alleged poor performance, with specific information on the problems and clear steps on what was needed to improve before being dismissed?
- (ii) after having his dismissal rescinded was Mr Mosen able to leave the workplace and still claim he was dismissed?

Was Mr Mosen fairly warned of alleged poor performance, with specific information on the problems and clear steps on what was needed to improve before being dismissed?

[4] Mr Mosen's terms and conditions of employment were set out in a written individual employment agreement. It was common ground that Mr Mosen was employed on the basis of a fixed term contract for the term of a specific project. Once the work being undertaken by Mr Mosen was completed, the employment agreement provides for the employment to end. Mr Mosen's hourly rate of pay was \$30.00 per hour inclusive of holiday pay. The company provided shared accommodation at the Kamo Holiday Park for the duration of the project for Mr Mosen.

[5] AEL enters into contracts with other companies to provide specialist welding services at various sites within New Zealand. The project Mr Mosen was involved in was on the Golden Bay Cement plant at Portland near Whangarei. AEL was contracted to Cullen Engineering Ltd to undertake work at Cullen's direction.

[6] Mr Mosen was one of four men employed to work on site in Whangarei for approximately 40 days, on the night shift.

[7] Following his induction onto the site, Mr Mosen commenced his first shift on 17 July 2006. Mr Dean Ratu, Mr Mosen's supervisor, says he became concerned about Mr Mosen's skill level shortly after he commenced working. It was common ground that after he became concerned about his skill level, Mr Ratu worked closely with Mr Mosen and provided him with assistance. Mr Mosen was not aware of the concerns Mr Ratu held about his skills as Mr Ratu never discussed these with him.

[8] On 24 July 2006, Mr Mosen and Mr Ratu worked on welding a large chute. The following day at the beginning of the shift, Cullen's shift foreman approached Mr Ratu and Mr Mosen and raised concerns over the quality of a piece of welding completed by Mr Mosen the previous evening. Mr Ratu was of the impression that the work had been completed at the end of the shift and felt Mr Mosen had probably rushed to get it finished. Mr Ratu did not share his thoughts with Mr Mosen. Mr Ratu was quite satisfied with the rest of the work Mr Mosen had completed on the chute.

[9] When he commenced work that same night (25 July) Mr Mosen was asked by the Cullen's supervisor to complete a piece of work on his own. Mr Ratu was of the understanding that this request as a "test" to test Mr Mosen's competency in welding. Mr Mosen says he was not aware it was a "test". I am satisfied that if the request for Mr Mosen to work unsupervised on 25 July did form a work test in relation to his competency it was contingent on Mr Ratu to make this clear to Mr Mosen, and to also set the standard to which Mr Mosen was expected to achieve. This was not done.

[10] The work set for Mr Mosen required a platform to be secured to another structure. Mr Mosen worked with two other workers who were fitters, but not welders by trade. It was common ground that during a smoko break Mr Mosen approached Mr Ratu and advised him that the work was difficult.

[11] At the end of that shift (on the morning of the 26th) Mr Ratu was approached by Mr Rob Kerwin, Golden Bay Cement's site supervisor. Mr Kerwin was accompanied by Cullen's night shift supervisor. Mr Kerwin told Mr Ratu, Mr Mosen's work was not up to an acceptable standard and he was not to undertake any further work on the site. Mr Ratu then contacted Mr Tony Dunnill, the Administration Manager for AEL. Mr Ratu explained to Mr Dunnill the conversation he had had with Mr Kerwin, following which the two men agreed that Mr Mosen would be moved to AEL's Huntly site where work was available for him.

[12] In the meantime Mr Mosen's girlfriend, Ms Julie Savage, had arrived in Whangarei to stay with Mr Mosen for a night. This arrangement had been previously organised and was known to Mr Ratu. Mr Mosen and Ms Savage had booked into accommodation away from the Kamo Holiday Park. The day and night of 26 July was Mr Mosen's night off, he was not due to commence work again until the evening of 27 July 2006.

[13] Not long after Mr Mosen had arrived at the hotel, having completed his nights work, Mr Ratu also arrived to talk to Mr Mosen. Mr Ratu relayed to him the discussion he had had earlier that morning with the supervisors from Cullen's and Golden Bay Cement. Mr Ratu advised Mr Mosen that he had not passed the test and he was to be let go, and advised him there was an opportunity for Mr Mosen to be located at Huntly.

[14] A discussion followed about the work Mr Mosen had undertaken and issues he had had, performing the work. Surprisingly, at the investigation meeting, Mr Ratu told me he did not believe the poor quality of work was entirely Mr Mosen's fault. Having said that Mr Ratu then told me he had not actually viewed the work undertaken on the platform and so was not in a position to say whether the work was up to standard or not. He simply relied on what he was told.

[15] Mr Mosen then went to bed to sleep. That afternoon, at about 4.30pm he travelled to the Kamo Holiday Park

[16] Mr Mosen approached Mr Ratu who confirmed to Mr Mosen that his employment was at an end due to his poor performance. At this point I have concluded Mr Mosen's dismissal was unjustified both substantively and procedurally. Mr Ratu accepted at the investigation meeting that Mr Mosen was not warned of his alleged poor performance, or provided with specific information on the problems and clear steps on what was needed to improve before he was dismissed. Mr Ratu also accepted that there was an absence of any procedural fairness.

After having his dismissal rescinded was Mr Mosen able to leave the workplace and still claim he was dismissed?

[17] Matters did not end with Mr Ratu's notification and confirmation to Mr Mosen that he was dismissed. Mr Mosen was not satisfied with the decision to dismiss him and he insisted that he meet with the site manager to discuss his situation. A meeting was duly arranged for 6.30pm that evening (26 July). Mr Ratu attended the meeting with Mr Mosen.

[18] At the meeting Mr Kerwin and Cullen's night shift supervisor explained to Mr Mosen, the issues they had with his work. At that meeting it was agreed the dismissal would be rescinded and that Mr Mosen would undertake a further work trial after which time the situation would be reassessed. It was also agreed that the work trial would occur on the shift commencing on 27 July as the 26th was Mr Mosen's night off and he wanted to spend it with Ms Savage.

[19] On 27 July 2006, Ms Savage was to return to Rotorua and drove Mr Mosen to the Kamo Holiday Park to drop him off. On his arrival he found his bags and other belongings on the porch outside the room he had shared with another AEL employee, Mr Varian Wi. Mr Mosen went to Mr Ratu's door and attempted to rouse him to find out why he had lost his accommodation. Unfortunately Mr Ratu was asleep and did not hear the knocks on the door or his cellphone ringing.

[20] Mr Mosen's "flatmate" Mr Wi had been moved out of their shared accommodation and into another unit. While Mr Mosen was attempting to rouse Mr Ratu, Mr Wi appeared. Mr Mosen says he told Mr Wi he had been let go, but that he had a nights trial that evening. He also told Mr Wi his belongings had been moved out of his room and it appeared he no longer had any accommodation. Mr Wi offered Mr Mosen the couch in his unit for him to sleep on.

[21] The accommodation arrangements were altered by the Holiday Park Manager after Mr Ratu had advised her Mr Mosen would be gone until the weekend. Mr Ratu acknowledged at the investigation meeting that he had assumed Ms Savage would be in Whangarei until the

weekend. Mr Ratu told me it was not uncommon for the Manager to shift people into smaller units to make way for others coming into the accommodation especially for weekends. Mr Ratu was unequivocal in his evidence that a room was always available for Mr Mason. I am satisfied there was always accommodation available for Mr Mosen at the Kamo Holiday Park pursuant to his employment agreement with AEL.

[22] Mr Ratu really ought to have checked his facts before advising the Manager of Mr Mosen's absence, especially when he knew there was a possibility Mr Mosen would be taken out of the room during his absence. The fact that his bags had been packed up and his "flatmate" had been moved to a single room left Mr Mosen thinking he no longer had any accommodation. When he reported to Ms Savage that he had found all his bags packed, she encouraged him to return to Rotorua with her.

[23] Unable to wake Mr Ratu, and sensing that he had been kicked out of his accommodated, Mr Mosen agreed to leave with Ms Savage and return to Rotorua. Before he left Whangarei he returned to the worksite to pick up his personal work gear. As he was leaving the worksite, Mr Mosen was approached by a representative of R & R Ltd who offered him a job in Huntly. As events transpired Mr Mosen accepted this offer of employment and from 28th July 2006 was unavailable to undertake any further work for AEL.

[24] It is well recognised that sometimes a breach of contract could be put right before it caused any damage (*Rankin v Attorney-General in Respect of the State Services Commissioner* [2001] 1 ERNZ 476). In Mr Mosen's case the unjustified dismissal was quickly rescinded at the instigation and with the agreement of Mr Mosen. He was adamant at the investigation meeting that had he completed the trial on the night of 27 July 2006 he would have passed it.

[25] The actions of the park manager in removing Mr Mosen's belongings out of his room had the appearance of him being left high and dry. It was common ground that the removal occurred as a result of the actions of Mr Mosen's supervisor, however, as I have already found, that action was as a result Mr Ratu not checking his facts about the length of stay of Ms Savage. I have concluded the change in accommodation arrangements was not as a result of any attempt by the respondent to push Mr Mosen out and leave him without suitable accommodation. It was as a result of miscommunication.

[26] Mr Mosen's actions on 27 July 2006 in leaving Whangarei without notice and without completing his work trial leaves me to conclude that he was not dismissed but left of his own accord. Having negotiated a turnaround of the decision to dismiss, it was then contingent on Mr Mosen to stay and complete the test. I have concluded that the overturning of the dismissal and an agreement by Mr Mosen to undergo a performance test, cured the previous failures by AEL.

[27] I am unable to be of any further assistance to Mr Mosen.

Costs

[28] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority