

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Neil Osborne (Applicant)  
**AND** Southcore Limited (Respondent)  
**REPRESENTATIVES** Paul Brown, Advocate for Applicant  
Mike Klinkenberg, Advocate for Respondent  
**MEMBER OF AUTHORITY** Paul Montgomery  
**INVESTIGATION MEETING** 17 November 2004  
**DATE OF DETERMINATION** 25 February 2005

**DETERMINATION OF THE AUTHORITY**

**The employment relationship problem**

[1] The applicant was employed as a factory worker by the respondent commencing on 28 August 2003. Mr Osborne claims that on 4 September 2003 he suffered an out of workplace injury which necessitated 10 days off work. The applicant claims that the respondent dismissed him on 16 October 2003 in the course of a telephone conversation initiated by Mr Osborne in order to advise his employer that he had been medically cleared to return to work on 27 October 2003.

[2] The respondent agrees there was a telephone discussion with the applicant on 16 October 2003, but denies dismissing the applicant. The respondent's position is that Mr Osborne was unsure of how his back would hold up and stated that it might be better if he did not return to work. On that basis the respondent contends that given Mr Osborne's medical difficulties they mutually agreed to end the employment relationship.

[3] The respondent declined the remedies sought by Mr Osborne which were compensation for lost wages and compensation of \$5,000.00 for hurt, humiliation and costs. The parties attended mediation but were unable to resolve their problem.

**A brief history**

[4] The applicant had approached Workbridge for assistance in finding employment after being unemployed for about a year. He says that agency was fully aware of his medical condition and of the requirements of the role at Southcore and recommended a work trial. The applicant had suffered a previous back and neck injury and after a 1 day trial, Mr Klinkenberg offered Mr Osborne a position at \$12.00 an hour.

[5] The applicant started work on 28 August 2003 as a factory worker.

[6] On 4 September 2003 the applicant sustained an injury to his knee when away from the workplace which required 10 days off work. The absence was supported by a medical certificate and the employer advised.

[7] Mr Osborne returned to work on 15 September 2003 working on light duties for 2 days and then returning to full duties on 17 September until 2 October 2003. The applicant's evidence is that his return to fulltime duties *reaggravated* his injury. His statement of evidence does not specify which injury although it appears it was his back injury however, his knee continued to give some problems with some tingling in his thigh.

[8] After attending his doctor on 2 October 2003 the applicant was put off work until 16 October. On 16 October 2003 Mr Osborne returned for clearance to return to work. The applicant was told he could not return to work until 27 October 2003.

[9] Having been given this news the applicant rang Mr Klinkenberg to advise him of the situation. The parties agreed there was a discussion but differ on what was said rather than what was agreed. The applicant says he was dismissed; the respondent says they agreed the employment relationship was unsustainable in the circumstances and agreed to part. The applicant confirmed his claim no outstanding money is due to him.

### **The investigation meeting**

[10] The consultant from Workbridge who handled the applicant's placement appears not to have told the respondent that the applicant had a bad hip/lower back complaint, did not give the applicant the job description but referred Mr Osborne directly to the company without being present to introduce the client to his employer or observe the trial period even in part. Mr Osborne clearly thought this was unusual.

[11] The investigation meeting was congenial and more in the nature of a discussion on relevant issues. Evidence was sparse although the applicant produced two medical documents, one from Dr Shanks confirming the applicant had visited him on 16 October 2003 and *...that on the basis of his ongoing improvement he (Mr Osborne) would be ready to resume work on 27 October*. The report was dated 19 February 2004 which is three days after the statement of problem was lodged with the Authority.

[12] The second document was from the applicant's physiotherapist. It was dated 16 February 2004 and confirmed that Mr Osborne received 10 treatments over 4 weeks although the letter does not confirm the dates of treatment. The letter states *Neil presented to our clinic on 2.10.03 following an injury to his right knee when he fell and hit a curb*.

[13] No original medical certificates were presented in the evidence in the investigation meeting and the only material documentary evidence is the two reports mentioned above.

### **Discussion and analysis**

[14] This employment relationship began on the wrong foot. The failure of the applicant to disclose he had had problems with his lower back/hip and that he had participated in a rehabilitation program at Burwood Hospital is regrettable. It appears the respondent did not raise the issue with Mr Osborne as the job description he gave to Workbridge specifically ruled out candidates with back problems. The consultant at Workbridge never disclosed this information to the applicant and apart from referring him to the respondent took a thoroughly detached approach to the placement.

[15] If the applicant did resign or decide to *give it a miss*, then that was probably because he was persuaded by Mr Klinkenberg, a more confident personality and certainly more articulate. The initiative for the breaking of the employment relationship therefore would lie with the respondent. The applicant had telephoned Mr Klinkenberg to advise him that his doctor had not cleared him to return to work the following day but had in fact kept him from work for a further fortnight. I have no reason to believe that Mr Osborne, who on his own undisputed evidence had been attempting to find work for the past 12 months, would readily or willingly resign a position he had secured after that period of waiting. On the balance of probabilities I find it likely that the applicant had resigned under the persuasion of Mr Klinkenberg who was clearly frustrated with what he saw as the prolonged absence of the applicant at the respondent's busiest time of the year.

[16] It is also clear from the evidence that Mr Osborne was diligent at keeping his employer informed of his progress and was frustrated at his doctor not clearing him to return to work on 16 October. Clearly each party had its own reasons to be irked by the situation in which they found themselves.

### **Determination**

[17] I find that the applicant was unjustifiably dismissed.

### **Remedies**

[18] In finding for the applicant I am required to consider the appropriate remedies in this particular case.

[19] I direct the respondent to reimburse Mr Osborne for his loss of income over the 10 week period claimed at the investigation meeting. The actual gross sum is to be determined between Mr Klinkenberg and Mr Brown. In the event this cannot be agreed, leave is granted for either party to refer this matter back to the Authority for determination.

[20] In considering the applicant's claim for compensation I am mindful that during the term of his employment the applicant actually attended work for 20 days. I need to consider also the relatively sparse evidence presented as to the hurt and humiliation he suffered as a result of the dismissal. Weighing up these factors I think it just to award the applicant \$1,000.00 under this head of his claim.

### **Costs**

[21] The applicant through his advocate has claimed his legal costs. The awarding of costs is discretionary and is usually on the basis of a contribution to, rather than the paying of full client solicitor costs.

[22] The investigation meeting took 1 hour and 5 minutes and the applicant's statement of evidence was 1½ pages long. So bearing these two factors in mind I direct the respondent to pay the sum of \$300.00 as a contribution to his legal expenses.