

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Aaron Patterson (Applicant)
AND Millennium Electrical Limited (Respondent)
REPRESENTATIVES Aaron Patterson In person
Jeff Goldstein, Counsel for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 9 August 2005
DATE OF DETERMINATION 23 September 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Aaron Patterson was employed by Millennium Electrical Limited from about 25 November 2004 until his dismissal on 10 January 2005.

[2] I take from Mr Patterson's statement of problem and an amended statement of problem that there are broadly three issues concerning him about his employment and the dismissal. He is critical of an alleged lack of support and feedback from his employer during the probationary period. That problem can be resolved by looking at the nature of the employment, the relevant terms of the employment agreement and what was done by the employer to meet those obligations.

[3] The second issue is about the true reason for the dismissal. Mr Patterson says that he was redundant and should be and is entitled to the redundancy provisions of the employment agreement. That claim is based on his employer losing the contract to provide electrical services to Canterbury Spinners Limited, the site where Mr Patterson was based. That part of the problem will be resolved by assessing the evidence principally from Millennium Electrical about the reasons for the dismissal and the circumstances of the termination of the Canterbury Spinners contract.

[4] The third issue is whether Millennium Electrical can justify its decision to dismiss Mr Patterson. Millennium Electrical gave Mr Patterson a letter of dismissal that says: *we have reason to believe that your electrical experience, compared to that stated in your employment application, is seriously lacking in expertise and practice.* That followed some enquiries by Millennium Electrical about Mr Patterson's status as a registered electrician in Australia and his entitlement to work in New Zealand as an electrician. Millennium Electrical made these enquiries because of some incidents at work which caused Millennium Electrical to doubt the truth of Mr Patterson's claims about his training and experience as an electrician. To resolve this part of the problem I need to explain how the concerns arose, what Millennium Electrical did to investigate them and whether Mr Patterson was given a proper opportunity to respond to the concerns. If there is a grievance, it will

be necessary to consider the extent to which Mr Patterson's actions contributed to the circumstances of the grievance.

[5] There are several points about the investigation that should also be mentioned. Mr Patterson was originally represented by counsel who later advised the Authority that he would not be appearing at the investigation meeting. Millennium Electrical then asked for the problem to be struck out and/or an order requiring Mr Patterson to provide security for costs. The latter point was resolved by an assurance from Mr Patterson that, while he had returned to Australia, he had assets in New Zealand such as a motor vehicle. On the former point, I formed the view that I should at least convene the investigation meeting to deal with questions of Mr Patterson but that I did not require the respondent to provide statements of evidence. However, the respondent decided to provide statements and to have its witnesses at the meeting.

[6] There is a counterclaim by Millennium Electrical against Mr Patterson, but it is convenient to deal with that after resolving Mr Patterson's personal grievance.

[7] Despite mediation, the parties were not able to resolve these problems.

Terms of the Employment

[8] Millennium Electrical employed Mr Patterson as a shift electrician. There is a written employment agreement which provides for a three month trial period. There is express recognition at clause 27 that, in entering into the agreement, Millennium Electrical has relied on Mr Patterson's statements about his skills, knowledge and history. It is common ground that Millennium Electrical sought to employ a registered electrician. Mr Patterson told Millennium Electrical that he had applied for registration and a practicing licence in New Zealand based on his Australian registration and expected approval ...*any day*.... Mr Patterson denied having said this, but I prefer the evidence of the respondent's witnesses on the point. Mr Patterson's signed employment application form points out that his employment may be terminated if any information given by him is false.

[9] The employment was subject to the usual implied term as to trust and confidence.

[10] There were a number of incidents during Mr Patterson's brief period of employment which Millennium Electrical says gave it cause for concern over whether Mr Patterson was actually a qualified electrician. Mr Patterson disputes Millennium Electrical's account of those incidents. If it was necessary to resolve those conflicts, I would prefer the evidence of Millennium Electricals' witnesses to that of Mr Patterson. However, it is clear that Mr Patterson was not dismissed because of his work performance so it is not necessary to resolve the evidential disputes about those incidents.

[11] The obligation on an employer during a trial or probationary period is to support and counsel the employee with the aim of establishing a successful ongoing employment relationship. In some circumstances, that can include teaching the employee the basic skills involved in performing the job. However, in this case, Millennium Electrical wanted to employ a qualified and experienced electrician and that is what Mr Patterson purported to be. Mr Patterson was given an appropriate period of familiarisation with the workplace and the client's requirements. There was no obligation on Millennium Electrical to provide training in the skills one would reasonably expect of a tradesperson. Accordingly I reject the claims by Mr Patterson about inadequate support and feedback during the employment period.

The Reason for the Dismissal

[12] Mr Patterson's claim that he was dismissed because of redundancy rather than the reasons given by Millennium Electrical arose because, after the dismissal, he learned that Millennium Electrical had lost the Canterbury Spinners contract. His evidence is that his former work

colleagues were given notice of redundancy about two weeks after the date of his dismissal. They were then taken on by the new contractor. None of that has any relevance to the reasons for Mr Patterson's dismissal which I accept was entirely to do with the veracity of his claim to be a registered electrician in Australia who would be registered in New Zealand.

Millennium Electrical's Investigation

[13] As a result of the employment interview and application details given by Mr Patterson before he was employed, Millennium Electrical thought that he would be registered in New Zealand in accordance with the Trans-Tasman reciprocal arrangements once he had completed a brief safety course in New Zealand. Soon after he started work, arrangements were made for Mr Patterson to attend that course at his own expense.

[14] John Connolly is Millennium Electrical's operations manager. In December 2004, he and Millennium Electrical's assistant manager (Steve Evans) were at Canterbury Spinners. Mr Evans was assisting Mr Patterson to do some work which caused Mr Evans to develop some doubt about Mr Patterson's ability. Later, during the Christmas close down, Mr Patterson and another Millennium Electrical employee were doing some maintenance work. The other employee was sufficiently concerned about Mr Patterson's safety practice to speak to the foreman and Mr Connolly. Mr Patterson vehemently denies that there was any problem at this time but I do not accept Mr Patterson's evidence on the point. Mr Connolly learned of the matter on 10 January 2005 on his return from holiday. He spoke to other Millennium Electrical staff and Canterbury Spinner's electrician (Michael Pointon) and decided he had to check out the veracity of Mr Patterson's claim to be a registered electrician. To do that, he decided to meet with Mr Patterson.

[15] The meeting took place on Thursday 13 January 2005. Mr Connolly, Mr Adams and Mr Patterson were present. There are notes made by Mr Connolly in preparation for the meeting which he added to during the meeting. I accept the notes as an accurate summary of what happened. Mr Connolly put to Mr Patterson concerns about poor time keeping, excessive time spent on jobs, safe testing techniques, working alone, safety of Mr Patterson and others, and concerns expressed by Canterbury Spinners. Mr Patterson was asked if he was really an electrician and if he was registered. He was told that he could not work for Millennium Electrical unless he was registered with a practicing certificate. Mr Patterson gave some response to the performance issues raised. However, the meeting ended with Mr Connolly reiterating that Mr Patterson could not work for Millennium Electrical unless he was registered and had a practicing licence. Mr Patterson was asked to take the next day off on pay and to come back on Monday morning with proof of his registration.

[16] On 14 January 2005 Mr Connolly contacted the Electrical Workers Registration Board. They told him that Mr Patterson had applied for registration on 17 March 2004, that he had not provided any proof of his Australian registration and that nothing further had been received from Mr Patterson despite correspondence from the board. Mr Connolly asked the board to contact the Australian registration authority to see if Mr Patterson had ever been registered there. Later, Mr Connolly was told by the board that the Australian authority had no record of registration for Mr Patterson, that the registration number given by Mr Patterson was bogus and that the board would not be registering him.

[17] There was a meeting on Monday 17 January 2005 at Millennium Electrical's office. Present were Mr Patterson, Mr Connolly and Mr Evans. I accept Mr Connolly's evidence that he asked Mr Patterson for proof of registration but Mr Patterson did not provide any proof. Mr Connolly told Mr Patterson about the information (as above) given to him by the Board. Mr Patterson was asked if he was an electrician and if he had any proof of registration but had no answer to either question. Mr Connolly then told him he had no option but to give him notice of dismissal because there was no proof he was a registered electrician.

[18] Having decided to dismiss Mr Patterson and telling him that, Mr Connolly then went to get a letter, written on 11 January 2005, and gave that to Mr Patterson. The meeting ended. Later, Mr Patterson received pay up to 21 January 2005 together with his holiday pay.

[19] The letter is signed by Neil Green, Millennium Electrical's managing director. It expresses the reasons for the dismissal as follows: *we have reason to believe that your electrical experience, compared to that stated in your employment application, is seriously lacking in expertise and practice. Millennium Electrical are concerned for your safety in that your testing techniques and methods may lead to endanger yourself and other persons.* The letter suggests that Mr Patterson was dismissed because of the performance concerns discussed during the meeting on 13 January 2005. However, by the time that Mr Connolly made the decision to dismiss, events had moved on and Mr Patterson was actually dismissed because he could not prove that he was a registered electrician.

The Test of Justification

[20] Pursuant to 103A of the Employment Relations Act 2000, the question of whether the dismissal is justifiable must be determined, on an objective basis, by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal.

[21] Millennium Electrical's concern was initially about Mr Patterson's work practices compared to his claimed experience. That is why Mr Connolly raised the performance issues with Mr Patterson on 13 January 2005. Mr Patterson's work practices were such as to cause doubt in Mr Connolly's mind about whether Mr Patterson was actually a registered electrician. Millennium Electrical had prepared itself for the likelihood of a dismissal based on the work performance issues. After the meeting on 13 January, the focus of Millennium Electrical's concern changed to whether Mr Patterson had ever been a registered electrician and whether he could be registered in New Zealand. In the face of Mr Patterson's inability to prove registration in Australia and the information from the Board, Mr Connolly then concluded that Mr Patterson had never been registered in Australia and could not be registered in New Zealand. That was at odds with Mr Patterson's earlier claims. The job required a New Zealand registered electrician. Millennium Electrical decided it could no longer employ Mr Patterson in those circumstances and he was dismissed.

[22] Were the employer's actions when meeting with Mr Patterson and then dismissing him what a fair and reasonable employer would have done? I find that a fair and reasonable employer most likely would have dismissed Mr Patterson. He could not lawfully do the job he had been employed for and he had falsely represented at his interview that he was registered in Australia and would soon be registered in New Zealand

[23] The other actions of the employer that should be considered are the meeting arrangements and the way each of the two meetings were conducted. Ordinarily, one would expect a fair and reasonable employer to tell an employee that they might be at risk of dismissal and to give an opportunity for support or representation before requiring a response to concerns. That did not happen in respect of the meeting on 13 January 2005. By the end of that meeting however Mr Patterson knew that he had to prove his Australian registration or he would lose his job. He had several days to sort that out. However, it was not until after the start of the second meeting that Mr Patterson was told of the allegation that his Australian registration number was bogus. The information that the registration number was bogus and the associated conclusion that Mr Patterson had misrepresented his qualification were an integral part of the dismissal decision. At the time a fair and reasonable employer would have allowed for the possibility that an honest mistake might have been made by Mr Patterson or the Australian authority and Mr Patterson should have had a

reasonable opportunity to address that. Because he did not, I am forced to conclude that the dismissal in all circumstances at the time is unjustifiable.

Remedies

[24] I am satisfied to a high standard of probability that Mr Patterson's claim to be an Australian registered electrician is false. I have been provided with communications dated early February 2005 from the Board to Millennium Electrical and to Mr Patterson that confirm its information that the registration number given by Mr Patterson is bogus. Mr Patterson has had months between the dismissal and the investigation meeting to provide proof of his registration. He has not done so. The only sensible conclusion now available is that Mr Patterson has never been an Australian registered electrician.

[25] Mr Patterson provided me with two letters from the Board dated 8 April 2004 and 15 April 2004 in response to his initial application and a subsequent phone enquiry. I accept Mr Connolly's evidence that Millennium Electrical was not given the 8 April 2004 letter until after these proceedings commenced. That letter makes it clear to Mr Patterson that his application for registration could only precede *...upon receipt of the original of the appropriate Australian licence...*. In other words, Mr Patterson knew that his application for New Zealand registration had stalled but he nonetheless told Mr Connolly that he expected registration *...any day...*

[26] Mr Patterson's fraudulent misrepresentation about being an Australian registered electrician who would be registered in New Zealand contributed so significantly to the circumstances giving rise to the grievance as to disentitle him to any remedies despite his personal grievance.

Counterclaim

[27] In its statement in reply, Millennium Electrical seeks a penalty against Mr Patterson for a breach of his employment agreement being the misrepresentation by him about his qualifications. Section 134 of the Employment Relations Act 2000 makes every party to an employment agreement who breaches the agreement liable to a penalty.

[28] The relevant term in the employment agreement is clause 27. However, clause 27 does not expressly say that the representations made by Mr Patterson as to his qualifications are true. Mr Patterson did complete an *Employment Application Form* that includes an express undertaking as to the truth of his statements, but that document preceded the formation of the employment agreement. The agreement itself is said to supersede any other written, oral or implied agreement. Proof to a high standard is required in penalty claims. In these circumstances I am not prepared find Mr Patterson is liable to a penalty for breach of the employment agreement.

Summary

[29] Mr Patterson has a personal grievance but is not entitled to any remedy because of his contribution to the circumstances giving rise to the grievance.

[30] I do not find a breach by Mr Patterson of any of the express terms of his employment agreement.

[31] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority