IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 34/10
5275450

	BETWEEN	DAVID STEVENS Applicant
	AND	B M SCOTT LIMITED Respondent

Member of Authority:	P R Stapp
Representatives:	David Taylor for Applicant Graeme Gowland for Respondent
Investigation Meeting:	11 February 2010 at Palmerston North
Submissions received:	11 February 2010
Further information by:	25 February 2010[1]
Determination:	25 February 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Stevens was employed by B M Scott Limited (Scotts) as a painter/decorator. He commenced his employment on 6 March 1989. There was an individual employment agreement signed off by both parties.

[2] According to Mr Bruce Scott, company director, at the beginning of 2009 he raised with his staff that the year would be difficult. Mr Stevens denied this.

[1] Mr. Stevens' personal file was lodged in the Authority. No new information from the file has been relied upon in making the determination.

[3] Mr Scott says that at about 4pm on 6 March 2009 he informally impressed on the team that work was looking very tight. Mr Stevens denied there was any discussion with him because he would have gone home.

[4] Mr Scott says that two painters left in March and April 2009 and were not replaced. Mr Stevens did not disagree.

[5] Mr Scott says that on 1 May 2009 he raised options to keep jobs, including asking employees to take holidays and the introduction of shorter days. Mr Stevens denied the meeting took place, and says that there was no discussion with him.

[6] Mr Scott says that on 18 May he notified the employees, including Mr Stevens that work needed to be conserved, and he hoped to win another contract to provide work. The option of taking holidays was raised again. Mr Stevens denied the meeting taking place and he says that what Mr Scott says was discussed is not true.

[7] Mr Scott says he discussed with Mr Stevens and another employee the dire shortage of work while they were on a job at Levin Intermediate School. Mr Stevens denied being at the intermediate school with the employee Mr Scott referred to. He denied that Mr Scott talked to him.

[8] On 20 and 21 June Mr Stevens took annual leave, and his work was completed. There was no more work for him. Consequently Mr Scott and his son, Bernard Scott, also a director, met with Mr Stevens on 22 June to explain to Mr Stevens that two contracts were almost complete, and that a contract had been lost; Pukehou Garden Centre, which they were relying on to have some work available.

[9] Bruce Scott says that the option of taking 21 days annual leave was brought up during the discussion. Mr Stevens had an issue about being the first to be singled out. Bruce Scott says that his deliberations were based on who had the longest leave due. Bruce Scott says he explained to Mr Stevens that if the work situation did not improve it would become necessary to consider termination by reason of redundancy and to put in place a proper process before making a decision (Bruce Scott's statement).

[10] Mr Scott also offered Mr Stevens a week's stand down pay and hoped Mr Stevens would consider taking his accrued leave until more work became available.

[11] Bruce Scott says he then made the comment that if Mr Stevens found the proposal unacceptable and if he chose to leave and find another job, Mr Scott would understand that and could not stop him. Mr Scott says that Mr Stevens had the use of the week to decide what to do. In other words Bruce Scott's intention was to request Mr Stevens to consider using his annual leave, to pay Mr Stevens for the week because he had come into work where there was no work for him to do and to give Mr Stevens the week to decide to use his leave.

[12] Mr Stevens' version of the meeting was that Mr Scott told him that *"…there is a downturn in work. He had lost the Pukehou Nursery job and that he would give me my holiday pay, the week's wages he owed me, plus a week in lieu and that I should go and see WINZ"*. Mr Scott denied referring to WINZ. Mr Stevens assumed he was *"sacked"*, thus he says he went to WINZ the same day and requested work with another painter.

[13] Bruce Scott asked his office manager to prepare and type a letter summarising the outcome of the meeting and once it was completed Mr Stevens (and Mrs Stevens) collected it on 23 June. Mr Stevens says that the office manager confirmed that he had few options and no guarantee that there was a job after the 4 weeks was up. Mr Stevens' pay was prepared on the basis that he would take his annual leave.

[14] The letter read as follows:

> *23 June 2009*
>
> *Dear John,*
>
> *It is with regret that I write this letter. As you are aware, B M Scott Limited is now feeling the strains of the economic pressures and has had to review the viability of its current work-force. Work in the painting division has taken a downturn therefore we are in the position where we have to streamline its working team.*
>
> *John I am in the position to offer you two options.*
>
> 1. *That you use your 21 days Annual leave owing to you over the next four weeks and be on standby in case we have an upturn in work at the end of this period however there is no guarantee that there will be a*

> *position available to you.* ***You would therefore be laid off.*** *(emphasis added)*
>
> 2. *That BM Scott Limited terminates you immediately, paying you a week's wages in lieu and pay all leave entitlements owed to you.*
>
> *As I have mentioned above John, B M Scott Limited has to make changes with the unsettled climate we are facing and staff reduction is a sign of these changes. This is not a reflection on you. Please let me know what your intentions are so that we can take the appropriate action.*
>
> *Regards,*
> *Bruce M Scott*
> *Managing Director*

[15] Mr Stevens engaged an advocate, who sent a letter dated 29 June 2009 to Scotts, raising a personal grievance claim and seeking $20,000 for unjustified dismissal, failure to consult and failure to pay notice.

[16] Mr Scott further wrote to Mr Stevens on 2 July 2009, after the personal grievance and claims were raised. That letter read as follows:

> *Dear John,*
>
> *I was very disappointed that you hung up on me yesterday as I was trying to explain to you that there was work for you at B M Scott.*
>
> *You are aware that we have been having a hard time of it with the recession and fall off of work. We met on Monday 22 June to discuss this, and because you had more accrued leave than anyone else, we wanted you to take some of this leave as we had lost the job at the Pukehou Garden Centre. I told you that I would drop a note about this which you picked up from Judy the following day.*
>
> *You then contacted B M Scotts and told Judy that you would take the second option and wanted to be paid up. I am very sorry that you didn't come and see me as I would have explained that it was not my intention of either the meeting that we had or my intention that you leave. You know that we had made it common knowledge that the painting side of our business was very lean and had been so for some time. You also know that three staff members who left recently have not been replaced.*
>
> *Your decision to terminate your employment seems to have been a heat of the moment situation and I want to let you know there is work for you and I would appreciate you contacting me immediately to arrange this.*
>
> *I look forward to hearing from you.*
>
> *Regards,*
> *Bruce Scott*

[17] Mr Stevens did not reply immediately to that letter but Bruce Scott's offer remained open (8 July 2009 letter).

[18] Mr Stevens replied on 12 July 2009 expressing his anger and shock at being dismissed. He expressed that he was angry and deeply hurt after 20 years of working for the company and that the company had betrayed trust in such a manner. He explained he had no warning or inkling when he arrived at the depot on 22 June to begin work that he was going to be called into the office and callously sacked. He explained that Mr Scott used the words *go home* and *you'd better see WINZ.* He complained that no one shook hands.

[19] There is no dispute that Mr Stevens received the letter dated 23 June. Mr Stevens decided to take option 2 because he assumed he had been *"sacked"* and that he had no other option because he had been "*sacked at the meeting on 22 June"*.

Issues

[20] There is a credibility issue between Mr Stevens and Mr Bruce Scott on the occurrence and content of any meetings/talks from January to May 2009 and the details of the 22 June 2009 discussion. There is a conflict about Mr Scott's letter dated 23 June and his written statement.

[21] Did Mr Scott refer to WINZ and did he discuss terminating Mr Steven's employment, and if so in what context? Was the option of taking holidays due until work became available discussed?

[22] What was the outcome of the meeting held on 22 June and what arrangements applied?

[23] How did the employment end? Mr Stevens understood he was dismissed and Messrs Bruce and Bernard Scott claim Mr Stevens terminated his employment of his own accord.

[24] Has Scotts acted as a fair and reasonable employer would in all the circumstances?

The Law

[25] The Arbitration Court held that the onus is on the applicant to establish a dismissal and that a "dismissal should not be construed narrowly". In addition "dismissal" has been defined as "the termination of employment at the initiative of the employer" (see *Wellington etc Clerical etc IUOW v Greenwich* (1983) ERNZ Sel Cas 95; [1983] ACJ 965). The Court made some general comments about personal grievance matters with a particular focus on defining constructive dismissal. However, the case also made comments concerning actual dismissals. The Court held:

> *… "dismissal" is a word with a wide meaning. It should not be construed narrowly. The word "dismiss" is derived from two words meaning "send" and "apart". A dismissal is a "sending apart" or "sending away" or "sending off".*
>
> *… [The] concept of dismissal need not involve any implication of fault, or of condemnation of the dismissed person. The modern equivalent would be an honourable retirement or a genuine redundancy. …*
>
> *… One of the difficulties that we face today with the word "dismissal" is the emotive images which it conjures up in many minds. Employees speak of "being fired" or "being sacked" or "getting the boot". There is no doubt that being dismissed can be a very traumatic experience, but the Court has to try to consider in a dispassionate way the definition of the word in the statute.*
>
> *The word dismiss conjures up vivid images in the mind formed from events past and present. These are sometimes derived from what could almost be described as "propaganda images". …*
>
> *… The law governing employment dismissals must take account of all … different circumstances and be fair to all employees and to all employers. Therefore we think it is advisable to try to separate the word "dismissal" from its emotive connotations. It may be better, in thinking of a dismissal, to make use of the terminology of I.L.O. Convention 158 (22/6/82). For our purposes, we define a dismissal as "the termination of employment at the initiative of the employer". Such a definition covers dismissal both upon notice and without notice, and dismissals both actual and constructive. …*
>
> *… In actual dismissal there is an express termination whereas in constructive dismissal there is conduct repudiating existing arrangements or "sending apart". It is essential to examine the actual facts of each case to see whether the conduct of the employer*

> *can fairly and clearly be said to have crossed the borderline which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.*

[26] In the above case, the Court referred to another case, *North Island Wholesale Groceries Ltd v Hewin* (1982) ERNZ Sel Cas 27; [1982] 2 NZLR 176; (1982) 5 NZTC 61,289 (CA) and quoted from that case:

> *"The law as to repudiation of contracts was reviewed by the House of Lords in Federal Commerce and Navigation Ltd v. Molena Alpha Inc (1979) AC 757 and has since been discussed in this Court in Devonport Borough Council v. Robins [1979] 1 NZLR 1 and Starlight Enterprises Ltd v. Lapco Enterprises Ltd [1979] 2 NZLR 744. The speeches of their Lordships emphasise that to amount to a repudiation a breach must go to the root of the contract …*
>
> *Then in the Starlight case where, as here, the construction of a letter written by one of the parties was at the heart of the matter, Woodhouse J said at p.746 that the critical question was whether the letter regarded objectively by the reasonable man amounted to a distinct and qualified refusal to be bound by the terms of the contract in the future. … So, the first question is simply whether a reasonable person would conclude from the letter that the writer and those for whom he spoke did not intend to perform the obligations they had undertaken. If so the other party is entitled (and where, as under a contract of employment, it is a confidential relationship may be obliged) to accept the repudiation and treat his own obligations under the contract as at an end. He has a reasonable time to consider his position and communicate his response to the defaulting party, or otherwise evince it by his conduct, a matter which may be of importance in cases where the communication from the employer is not an out and out dismissal."*

[27] The Arbitration Court in *Greenwich* p 978 held that:

> *In all the circumstances of that case the Court of Appeal decided that Mr Hewin was entitled to treat his contract as at an end, even though he had not been expressly dismissed by his employer. The employer's letter to Mr Hewin could "only be characterised as a repudiation of the existing service contract". The action of the employer, although not an express or formal dismissal, gave Mr Hewin the right to elect to treat his employer's actions as terminating the contract. Once Mr Hewin properly made that election, there was a constructive dismissal by the employer. The dismissal being wrongful, Mr Hewin succeeded in his claim for damages.*
>
> *Again, the degree of misconduct necessary to constitute fundamental breach is a matter of value judgment by the Court, after it has had regard to the legal principles. Again, we may view the termination in two ways. First, the employment relationship has been terminated by the action of the employee in accepting the employer's repudiation. In most cases the employee will have no option … There can be cases in which the employee is not forced to accept the employer's repudiation … The termination by the employee may be described as*

> *a resignation but this is not entirely accurate. It is really a leaving, or a justified "going apart", by the employee. Looked at in a second way, the situation can be thought of as a constructive dismissal. The employer's conduct is equivalent to a dismissal, or to an offer of dismissal upon open or acceptance by the employee. The original initiation to terminate has come from the employer. That initiative has been responded to by the employee. In a constructive dismissal, the first phase, employer misconduct, takes place at the initiative of the employer, and the second phase, the employee's leaving, takes place at the employee's response either voluntary or involuntary.*

Determination

[28] This is a credibility matter. I accept that Mt Stevens genuinely believed what he says, and it may be that he has come to believe what he says, but that does not necessarily mean that what he says is correct.

[29] Scotts has been able to corroborate its evidence. I heard the evidence of Messrs Bruce and Bernard Scott, and Glen Moore, painter/foreman. They remembered the meetings/talks and "pep talks' taking place. The three of them said that the meetings did take place during 2009. Mr Moore says that he took leave during the year (April) to help the business (holiday record produced). He confirmed the evidence from Messrs Bruce and Bernard Scott that the situation the business was facing was tight, and work depended on getting contracts and keeping regular work, which had declined. Mr Stevens did not challenge that there had been a down turn in the work. Messrs Bruce and Bernard Scott and Glen Moore said that other employees also took leave during the year (which was not challenged). In addition there was the evidence that two employees had left and were not replaced.

[30] Mr Bruce Scott accepted responsibility and signed off the letter dated 23 June, although it was written by the officer manager. Mr Scott informed me that, in hindsight, he accepted it was poorly written, but says it was written to reflect the intention of the 22 June meeting. He acknowledged that the letter was flawed considering his evidence that there was a discussion that if Mr Stevens decided not to use his leave then a process in regard to redundancy would need to be put in place (statement of evidence). He says that it was not envisaged that Mr Stevens would be laid off without a process.

[31] Mr Scott explained that the reference to the termination option arose from the discussion about the company not being able to prevent Mr Stevens from getting other employment if he chose to do that where there was no work at Scotts. The purpose of the stand down week was to enable Mr Stevens to have time to consider the request to use his leave and there had been no demand made for him to take his holidays. Bruce and Bernard Scott told me that because there was no work it was only fair the Mr Stevens was paid for the week and there was little point for Mr Stevens to remain at work with nothing to do. Messrs Bruce and Bernard Scott say that the meeting ended cordially and agreed that no one shook hands because there was no need to do so. They both were surprised when they learnt the next day that Mr Stevens had decided to take option 2 and end his employment. They did nothing to follow it up until Mr Stevens raised a personal grievance on 29 June that he had been dismissed on 22 June. Mr Bruce Scott advised Mr Stevens that work was available, because a contract had arrived.

[32] It is more than likely that Bruce Scott did discuss with Mr Stevens taking annual leave until more work was available. Mr Stevens had been on leave for 2 days during which time his work had been completed and he did not challenge that there was no more work for him painting. It is more than likely Bruce Scott referred to Mr Stevens' 21 days leave because Mr Bernard Scott confirmed they had the details at the meeting. He corroborated Bruce Scott's version. They both denied that there was any reference to WINZ, but did not deny discussing that if Mr Stevens wanted to leave they would not be able to stop him if he found other work. I accept their evidence because Mr Stevens made no indication to them at the time of the meeting that he understood he was being dismissed. He clearly formed that view later, possibly walking home or when he discussed it with Mrs Stevens. Mr Stevens accepted that no one used the words "sacked", "dismissed" and "fired". He told me that he made his own assumption that he had been dismissed. That is not enough to establish that he was dismissed on 22 June. Thus, I conclude he was mistaken.

[33] It therefore leads me to the conclusion that it was more plausible that his reason for taking option 2 was because it fitted his belief/assumption that he had been dismissed.

[34] The option of using a further week and option "1" in the letter were consistent with the outcome of the meeting that Messrs Bruce and Bernard Scott say they intended. However the communication of the intention has been affected by the letter dated 23 June.

[35] Mr Stevens considered the letter and decided to take option "2" because he says he had no other option. That would have been on a mistaken belief, I hold. The letter informed him he would be laid off. He was entitled to rely on that letter because it had been signed off by Mr Bruce Scott.

[36] The letter was certainly flawed and most unfortunate that it even referred to terminating the employment and making a reference to laying Mr Stevens off. It is fatal because the letter misled/misinformed Mr Stevens on that option, even although he was mistaken about the outcome of the 22 June meeting. That was unfortunate too because Mr Stevens had a week to further discuss the matter if he wished to. However, the letter was at the employer's initiative and as such being laid off is a form of dismissal. The option was put by the employer and Mr Stevens chose "termination" due to the lack of work. Thus on choosing that option he was dismissed by Scotts. Furthermore the option was put to Mr Stevens in the absence of a process in regard to redundancy being put in place as Mr Bruce Scott says he envisaged (statement of evidence). Any discussion on the options by the office manager, as claimed by Mr Stevens, and not challenged reflects the difficulty the company was in when Mr Stevens says the office manager said that there was no guarantee of a job after the 4 weeks was up..

[37] The situation is further exacerbated when Mr Bruce Scott made no attempt to pursue Mr Stevens when he found out Mr Stevens was taking option 2, and if Mr Scott did not mean that as an outcome, and was surprised, a fair and reasonable employer would have initiated contact to check it out and fix it quickly. I accept that Mr Scott did not know that Mr Stevens believed he had been dismissed on 22 June, at least until 29 June, when the grievance was raised. Mr Scott's actions to offer work after that were genuine offers for work that had become available (document produced) as opposed to putting in place damage control over the personal grievance being raised. Mr Stevens had a responsibility also to communicate constructively over the offer of the availability of work too.

[38] Mr Stevens I find was mistaken and put his own interpretation on the outcome of the 22 June meeting, wrongly as it transpires. It does not mean that Mr Stevens was not telling the truth, but he has misunderstood the situation. Given that Bruce Scott's evidence was corroborated, that he accepted the letter was poorly worded and that his and Bernard Scott's and Glen Moore's evidence was consistent, I have accepted what they have said about that meeting. Thus as there was no dismissal on 22 June as the employer contended, but Mr Scott's action after that, when he initiated the option to lay Mr Stevens off because there was not enough work, was the employer's responsibility and was a dismissal that related to redundancy.

Conclusion

[39] I put both parties on notice that while the employment relationship problem claimed an unjustified dismissal that I would be considering if the personal grievance was a grievance other than the one claimed (s 122). On the same facts I hold that Mr Scott's letter dated 23 June misled/misinformed Mr Stevens in his employment because he had not been dismissed before it. This is despite Mr Stevens thinking he had been dismissed; and if the employer did not know that at the time, and was giving Mr Stevens time to consider options, and in particular which involved an option that was not meant, and where the letter made reference to laying him off was wrong, then Mr Stevens has a grievance where he has been disadvantaged with the loss of his job and was actually dismissed. The dismissal can not be justified because of insufficient consultation on a redundancy process and before making a decision.

Remedies

[40] Mr Stevens can not be compensated for his lost wages because he failed to properly mitigate his loss. Asking for one job was not enough to mitigate loss, I hold. He was paid all his entitlements, wages due and an extra week. I am satisfied that he was offered work by Scotts later, but he unreasonably refused it given his length of service and the difficulty to get alternative work. I am satisfied that at the time Scotts had no work until further work became available and was offered to Mr Stevens. This was a genuine offer for work, I hold. Mr Stevens' failure to take up that option means he can not claim any further lost wages.

[41] He has claimed compensation. I have assessed his evidence and find that he was angry and shocked about the situation. There is no contribution where the employer failed to properly consult and Mr Stevens can not be blamed for the employer's letter that lead Mr Stevens to decide to take option 2 that meant he was being laid off. I accept his anger and shock supports that there was an impact on his feelings and he felt hurt. This was caused by the employer's failure to properly consult Mr Stevens. I have not given any weight to the two medical certificates provided by Mr Stevens because they were not produced in evidence by the doctors and I was not able to question the doctors. There was too much of a risk that the evidence was self serving. Because there was a genuine situation of no work and Mr Stevens decided not to take up the offer of work when it became available Mr Stevens can not be compensated for the loss of his job. However for his hurt in regard to the flawed process I order B M Scott Limited to pay Mr Stevens $3,000 under s 123 (1) (c) (i) of the Act.

Costs

[42] B M Scott Limited is to pay Mr Stevens the $70 filing fee. There are no other costs claimed.

P R Stapp
Member of the Employment Relations Authority