

Determination Number: WA 122/05

File Number: WEA 113/05

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

<b>BETWEEN</b>	Graham Tasker (applicant)
<b>AND</b>	Berdeck Investments Limited (respondent)
<b>REPRESENTATIVES</b>	the applicant represented himself Peter Brosnahan for the respondent
<b>MEMBER OF THE AUTHORITY</b>	Denis Asher
<b>INVESTIGATION</b>	Wanganui, 14 July 2005
<b>DATE OF DETERMINATION</b>	19 July 2005

**DETERMINATION OF AUTHORITY**

**Employment Relationship Problem**

1. Mr Graham Tasker says he was unjustifiably or constructively dismissed – statement of problem received on 7 April 2005. He seeks lost remuneration, compensation for humiliation, etc and costs.
2. The Company denies the allegations – statement in reply received on 14 April.

3. The parties underwent mediation but the employment relationship problem remained unresolved.

### **Investigation**

4. The parties agreed to a one-day investigation in Wanganui commencing at 9.30 a.m. on Thursday 14 July 2005. The parties usefully provided witness statements and documents in advance of the investigation. Efforts by the parties during the investigation to settle this matter were unsuccessful.

### **Background**

5. From the statements provided by the parties and the evidence presented at the investigation, I am satisfied that key background details are as follows.
6. The Company operates out of Wanganui and undertakes the retail sale of vehicle parts, panel beating, car repairs, engineering/track repairs, truck and trailer maintenance and towing and salvage.
7. Early in 2002 Mr Tasker sighted a Company advertisement. It sought someone experienced in mechanical/engineering, a requirement described as "*essential*". The advertisement also specified that the position entailed "*job costing, parts support, customer liaison in a large diverse workshop*".
8. Mr Tasker applied for and was appointed to the position with the Company on 15 April 2002. His terms and conditions of employment were set out in a written individual employment agreement and signed off on 16 July 2002. Purportedly for one-year, the agreement properly prevailed throughout Mr Tasker's entire employment.
9. No position description or job description was ever set out in writing. Instead, Mr Tasker's duties were those set out orally during in initial interview for the position, which built on the advertisement details, and as they evolved during the life of his employment.

10. Around mid-September 2002, and as indicated during his initial job interview, a Company director, Mr Gregory Cox, approached the applicant with the proposal that he join its Middle Management Group. Mr Tasker agreed. On 18 September he signed an agreement that saw him become a member of the Group.
11. By signing the Group agreement, and in addition to weekly meetings, Mr Tasker committed himself to assisting “*with the directional control of the Company*” and to taking “*pro-active action to move the Company forward*” (attachment to the statement in reply). In exchange Mr Tasker was eligible for a profit share arrangement.
12. At a meeting of the Group at the end of October 2003 Mr Cox put forward a proposal in respect of the applicant which, amongst other changes, would see him relocate to the Retail Parts Department and take on additional duties there while continuing with his normal daily work. Mr Tasker says he opposed the proposal at the meeting but felt pressured to agree. Having reflected further overnight, Mr Tasker approached Mr Cox the next day to tell him he did not agree with the change. Later that day Mr Cox advised the applicant he would not now be required to relocate, and that he was to carry on with his regular duties.
13. On 6 January 2004 Mr Tasker says he overheard Mr Cox make denigrating comments to another employee about the applicant’s inability to successfully run a business. Consistent with, he says, the provisions of his Group agreement, he resolved to raise his concerns about Mr Cox’s comments with the Middle Management Group.
14. In the same month, Mr Tasker found himself undertaking more and more mechanical repair duties in the workshop. This was because, he says, of the way Mr Cox was allocating workshop tasks, over and above his normal duties. Mr Tasker challenged Mr Cox about the extra workshop time: Mr Cox told him it was temporary, and would stop when another worker returned on 19 January.
15. On 19 January, the applicant was allocated further mechanical repair jobs. He was also advised that, on Mr Cox’s instructions (who was on leave at the time), he would be working full time in the workshop from that day. Mr Tasker reacted to these developments in a number of ways: first, he approached another director, Mr Steven

Shotter, with his concerns. Second, he resolved to resign from the Group. Third, he explained his reasons for resigning to the Group at its meeting on 27 January, as well as his concerns about Mr Cox's overheard remark and what he saw as a unilateral variation to his employment, i.e. his full-time relocation to the workshop.

16. Mr Tasker says he received very little response from Mr Shotter or the Group to his concerns. He therefore set out his concerns again to the Group, this time in a letter dated 10 February. He made it clear that if he did not receive a written, public apology from Mr Cox and was not returned to his normal position then a resignation letter would follow.
17. Mr Tasker approached Mr Shotter on the following day, 11 February, with an inquiry as to the Group's response. Mr Shotter advised that, amongst other things, the Group was of the view the dispute was between the applicant and Mr Cox. Later the same day Mr Tasker resolved to resign his employment and did so in writing, giving the required four-week's notice.
18. While Mr Cox returned from his leave a few days later, no discussion took place between the two men about Mr Tasker's resignation before it took effect.

### **The Applicant's Position**

19. As Mr Tasker made clear during the Authority's investigation, he believes the Company did not treat him in a fair and reasonable manner, did not act in good faith and that it conducted itself,

*in a calculated manner knowing that it was likely to damage the relationship of confidence and trust.*

*I also believe that (the Company)*

- (a) *deliberately breached my employment agreement by unilateral variation to the terms of employment and (left) me no option than to resign my position."*

(statement of problem)

20. Mr Tasker also argued that the Company acted in breach of his employment agreement by not following the disputes procedure and in particular by not responding to his stated concerns.

### **The Respondent's Position**

20. Because of my findings it is not necessary to set out a summary of the Company's position

### **Discussion and Findings**

21. I am satisfied the applicant was not unjustifiably or constructively dismissed for the following reasons.
22. There is no evidence to support a claim that Mr Tasker was ever dismissed, unjustifiably or otherwise. Instead, it is clear that Mr Tasker resigned his employment.
23. In a leading case on constructive dismissal, *Auckland Shop Employees' IUOW v Woolworths* (1985) ACJ 963, the Court of Appeal found that a resignation can amount to a dismissal where a worker resigns as a result of a breach of duty by the employer. The resignation must be caused by a breach of duty and must be of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing. The issue was whether a substantial risk of resignation was reasonably foreseeable having regard to the seriousness of the breach.
24. I am satisfied the Company did not act in breach of any of its duties to Mr Tasker. This is because Mr Tasker did not have a defined job or set of duties as such. Instead, and by agreement when he elected to take up the offer of employment, and especially after he agreed to join the Middle Management Group, the applicant was putting himself into an environment in which the senior players – Mr Tasker included – were expected, and agreed, to 'muck in'. That is a significant strand in the evidence presented by the respondent's witnesses. I accept that evidence on its face

and because of the weight of the Group agreement that the applicant signed: in it he undertook to be “*pro-active*” in moving the Company forward.

25. I also reject Mr Tasker’s claim that the requirement to undertake workshop duties amounted to a unilateral variation. The applicant did not test the claim that the move was a permanent one at Mr Cox’s behest, by inquiring directly of Mr Cox himself. The latter denies that a permanent move was intended: instead, Mr Cox points to the large amount of time he and others were putting in, in the workshop at that time, to illustrate his claim that the request of Mr Tasker to do the same was prompted by the then seasonally linked increased workload and by unplanned staff shortages.
26. Mr Tasker’s own evidence, of how he successfully contested a planned change of his duties only 3-months beforehand, is evidence – I find – of an employer willing to listen to, and act on, the applicant’s concerns. That flexibility is evidence of a reasonable employer and does not support the applicant’s claim that it was instead acting in a calculated manner knowing that it was likely to damage the necessary relationship of confidence and trust.
27. I do not accept Mr Tasker’s argument that he was contractually entitled to expect the Group to respond to his grievance: his interpretation of his employment agreement is too narrow. The relevant clause talks of problems being dealt with “*at ... Management Meetings*”. It does not necessarily refer to Group Management Meetings (the applicant’s interpretation) and anyway provides for a plurality of meetings, if necessary, with which to address concerns. However, given that Mr Tasker was seeking a public apology from Mr Cox, it was entirely legitimate for the Group to defer any decision-making pending Mr Cox’s return in the very near future.
28. The applicant cannot account for his apparent need for an urgent decision, in the meantime. Mr Tasker similarly cannot account for failing to meet with Mr Cox when a meeting 3-months earlier had resulted in the outcome sought by the former. His impatience is all the more difficult to understand when it is appreciated that his four weeks’ notice would overlap with Mr Cox’s return.
29. I have no difficulty in accepting Mr Cox’s explanation for not taking the initiative on his return, and arranging a meeting with Mr Tasker: he was not up to it because, Mr Cox

explained, he was still distressed by the recent tragic death of a close friend and understood the applicant was also contemplating lodging a personal grievance, in which case a meeting risked an adverse outcome.

30. Any breach of good faith, of confidence and trust, resides with Mr Tasker's peremptory actions, if it exists anywhere at all.

### **Determination**

31. For the reasons set out above I find against the applicant, Graham Tasker's, claim that he was unjustifiably dismissed or constructively dismissed by the respondent, Berdeck Investments Limited.
32. At the request of the parties costs are reserved.

**Denis Asher**  
**Member of Employment Relations Authority**