

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Paul Walton (Applicant)
AND European Stone Surfaces Limited (Respondent)
REPRESENTATIVES For the Applicant - Peter Hodge
For the Respondent - Ray Parmenter
MEMBER OF AUTHORITY Ken Anderson
INVESTIGATION MEETING 24 November 2004
DATE OF DETERMINATION 21 March 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

- [1] On 29 April 2004, Mr Walton was dismissed from his employment. He claims the dismissal was unjustified. Mr Walton now seeks that the Authority finds that he has a personal grievance and award him various remedies.
- [2] On the other hand, Mr Walton's employer says that because Mr Walton was involved in serious misconduct, then dismissal was an option that was reasonably available and any fault is denied.

What happened?

- [3] Mr Walton started his employment with European Stone Surfaces Limited ("ESSL"), Auckland, in November 2003. The position involved templating, fabricating and installing granite kitchen bench tops.
- [4] Mr Peter Blundell is the Managing Director of ESSL. His evidence is that he had been concerned for some time that Mr Walton may not have been filling his time sheets in accurately but; "*It was difficult to prove anything.*"
- [5] Mr Blundell was at the Lynmall Shopping Centre at 11:40am on 16 April 2004, when he saw Mr Walton entering a music store. Upon returning to the workshop, Mr Blundell asked his Operations Manager, Mr Steven Pridmore, where Mr Walton was supposed to be working that day. It was established that Mr Walton had two jobs on, one at Lynfield at 10:00am, and another at Remuera at 1:00pm.
- [6] Mr Blundell concluded that Lynmall Shopping Centre was not near any reasonable route from the Lynfield job to the workshop or to the Remuera job. He was also informed by Mr

Pridmore, that there had been a recent issue involving Mr Walton asking another, but younger, employee, Mr James Goodwin, to falsify his [Mr Goodwin's] time sheet.

- [7] From there, Mr Blundell gathered together a number of Mr Walton's time sheets and following some enquiries of a number of clients, he came to the conclusion that all was not as it should be. To Mr Blundell, the time sheets for the weeks ending 2 April 2004 and 16 April 2004, revealed six examples of an anomaly between the times that Mr Walton had recorded against the respective jobs, and the real time spent on each job.
- [8] The six examples included the matter that Mr Pridmore had previously mentioned involving Mr Goodwin. This matter related to Mr Walton finishing work at 3:15pm on Friday 2 April 2004, but he entered on the time sheet that he had finished at 4:00pm. On that day, Mr Walton was working on the same job with Mr Goodwin who also finished at 3:15pm. However, Mr Walton persuaded Mr Goodwin to also enter on his time sheet that he had finished at 4:00pm, in order to be consistent with the record of Mr Walton. Then, on Monday 5 April, Mr Walton told Mr Goodwin to change the Friday entry to 3:30pm. Mr Goodwin did that.
- [9] It appears that Mr Goodwin's conscience came to the fore, as he confessed to Mr Blundell what had occurred and apologised for his behaviour.
- [10] There was a further anomaly relating to the day that Mr Blundell saw Mr Walton at the Lynmore Shopping Centre. Mr Blundell says that in addition to Mr Walton charging out two and a half hours for a twenty minute job at Lynfield, there was a question relating to what Mr Walton had been doing from 10:30am until starting the Remuera job. Then, there was the matter of Mr Walton's presence at the shopping centre.
- [11] On or about 3:50 on 16 April, Mr Blundell invited Mr Walton to attend a meeting, along with Mr Pridmore. Upon Mr Walton becoming aware that serious misconduct was alleged, he indicated that he would not enter into any discussion without a solicitor present. At that point, Mr Walton was informed by Mr Blundell that he would be confined to working in the workshop until the time keeping matter was resolved. This also meant that Mr Walton would not have the use of the company van that he normally used to travel from home to various jobs and the workshop. Mr Pridmore offered to transport Mr Walton from his home to the workshop but this offer was declined.
- [12] A further meeting took place on the morning of 21 April 2004. Mr Walton was represented by Mr Hodge. The Authority has viewed the notes recording the basis of what was discussed. A number of matters regarding alleged falsification of his time sheets, along with the matter concerning Mr Goodwin, were put to Mr Walton. It also seems that earlier incidents and possible warnings were brought to the attention of Mr Walton.
- [13] Mr Hodge raised some questions about procedural aspects of the meeting, particularly the fact that Mr Walton had not been told in advance of the matters that he was required to respond to. Mr Hodge and Mr Walton departed without Mr Walton giving any comment or explanation about what had been put to him, though it appears that there was some indication given that now that Mr Walton was aware of the alleged serious misconduct he was required to respond to, a further meeting would take place.
- [14] On 26 April 2004, a further meeting took place at the office of the company's lawyer. The various matters of concern about Mr Walton's time sheets were once again discussed. Mr Blundell says that the explanations given by Mr Walton were lacking in substance. According to Mr Blundell, it appears that Mr Walton was reluctant to address some of the issues because

he did not have his diary with him and the meeting ended somewhat abruptly. Mr Blundell had earlier sighted Mr Walton's diary. His evidence is that there was nothing contained in the diary that was of any assistance in regard to clarifying Mr Walton's work schedule and times.

- [15] There is some inconsistency in the evidence about what happened following the meeting on 26 April. What is revealed, is that there was some unrest in the workplace, apparently emanating from the fact that Mr Walton was "grounded" at the workshop. Mr Blundell's evidence is that a meeting took place with Mr Walton along with Mr Pridmore. It was proposed that Mr Walton would receive a final warning and have a "probationary" period in the workshop, but this proposal was rejected by Mr Walton. His response was that Mr Blundell; [*"would have to pay him off."*]
- [16] The evidence of Mr Walton is that he was advised by Mr Hodge that the company's solicitor had been in contact and that a proposal would be put forward to Mr Walton for his consideration at a forthcoming meeting. The substance of the proposal being, that Mr Walton would receive a written warning regarding the time sheets and there would be a three month probationary period and a permanent demotion. The evidence of Mr Hodge enlarges upon and is consistent with what Mr Walton says and on that matter; I accept their evidence as being the most probable.
- [17] There was some ongoing discussion between the respective representatives and it was proposed that the parties would meet again on the afternoon of 29 April 2004.

A severance payment is discussed

- [18] In the meantime, another employee, Mr Stuart Thompson, of his own volition, due it seems, to his concern regarding the unrest in the work place, approached Mr Walton and asked him what it would take in monetary terms to resolve matters and leave the employment of the company. Mr Walton says that he informed Mr Thompson, "*off the cuff*" that he would probably accept four weeks wages, his holiday pay and current wages due.
- [19] Mr Blundell says that Mr Thomson conveyed to him that Mr Walton would accept a payment of \$4,000.00 and leave. The further evidence of Mr Blundell is that upon receiving this information, he met with Mr Walton and informed him that he would pay him that sum – he would give him a cheque there and then and Mr Walton could leave. Mr Blundell says that Mr Walton then informed him that he had changed his mind and wanted more money.
- [20] The evidence of Mr Walton is that Mr Blundell told him that he should accept what was being offered or; [*"he would sack me and dig his toes in and stretch it out for years."* Mr Walton says that he informed Mr Blundell that the offer was unacceptable and that matters should be left until the meeting that was set with the representatives that afternoon.

The dismissal

- [21] Mr Blundell went back to his office, "*thought about it*" and decided that there was no point in having any further discussion with Mr Walton. He then called Mr Walton into his office and informed him that he had considered Mr Walton's; [*"excuses for stealing time and had decided, with full consideration, that it was a sackable offence and that I was dismissing him."* Mr Blundell also acknowledges that he might well have mentioned the matter of Mr Goodwin's time sheet as a reason for the dismissal.

[22] The evidence of Mr Walton regarding his dismissal is more or less consistent with that of Mr Blundell, but he says that Mr Blundell told him that he; [*“was sacking me on the spot for attempting to coerce a junior employee to falsify his time sheet.”*]

What has to be determined?

[23] Given the overall circumstances pertaining to the dismissal of Mr Walton, I am required to examine several matters:

1. **Was a fair and full investigation carried out into the actions of Mr Walton pertaining to his time keeping records and his influence upon Mr Goodwin?**
2. **Did Mr Walton have a real as opposed to a nominal opportunity to attempt to refute the allegations against him or to explain or mitigate his conduct?**
3. **Did Mr Blundell have reasonable grounds to believe there had been misconduct by Mr Walton of sufficient gravity to warrant his dismissal?**

A fair and full investigation?

[24] I conclude that Mr Blundell did carry out a fair and reasonably full investigation into Mr Walton's time keeping records over the two most recent weeks. The evidence of Mr Blundell is that he contacted various clients and asked them pertinent questions, as to Mr Walton's time on the respective jobs, and received certain information accordingly that pointed to anomalies in Mr Walton's time sheets. In regard to Mr Walton's influence over the younger employee, Mr Goodwin, the evidence ascertained by Mr Blundell is quite conclusive. The results of Mr Blundell's investigation were fairly put to Mr Walton.

A real opportunity to explain and to mitigate conduct?

[25] I conclude that at the time of the dismissal, Mr Walton had only a nominal opportunity to refute the allegations against him and/or to explain or mitigate his conduct. Furthermore, contemporaneous with the discussions that were occurring regarding the possibility of an agreed severance of Mr Walton's employment, it had been agreed between the representatives of both parties, that a further meeting would take place to allow Mr Walton to have a real opportunity to refute the allegations against him and/or to mitigate his conduct. I accept that Mr Walton wished to avail himself of that opportunity and be represented accordingly, as he was entitled to.

[26] Unfortunately, it seems that Mr Blundell became impatient to have matters concluded, because when Mr Walton indicated that he would not accept the severance terms that were being offered, Mr Blundell chose to terminate the employment of Mr Walton without any further ado.

[27] Mr Walton was entitled to have a final opportunity to be heard. It had been agreed that this would occur on the afternoon of 29 April 2004. Whether anything that Mr Walton (or his representative) had to say, at the proposed meeting, would have changed the view of Mr Blundell is doubtful, but nonetheless, Mr Walton expected to and was entitled to, have this last opportunity. It was also possible that with the presence of the respective advocates, that a severance agreement could have been explored further and agreed to, thus allowing Mr

Walton to exit his employment without the stigma of a dismissal hanging over him, whether justified or otherwise.

- [28] I find that that the failure on the part of Mr Blundell to allow the agreed opportunity for Mr Walton to be finally heard before his employment was terminated, was unfair and unreasonable to such a degree that his dismissal was procedurally unjustified. Mr Walton has a personal grievance.

Reasonable belief of misconduct?

- [29] Despite the finding that Mr Walton has a personal grievance, I also conclude that on the basis of the evidence available to him following his investigation, Mr Blundell did have reasonable grounds to believe that there had been misconduct by Mr Walton, of sufficient gravity, to warrant his dismissal. I will come back to that matter when considering the remedies that may be available to Mr Walton.

Remedies

- [30] Section 123 of the Employment Relations Act 2000 (“the Act”), provides that having determined that Mr Walton has a personal grievance, the Authority; [“may, in settling the grievance, provide for remedies.”

- [31] Then, as provided by s 124 of the Act, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of the personal grievance:

- “(a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and
- (b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.”

- [32] Mr Walton asks that the Authority award him various remedies, including:

Reimbursement of wages

Mr Walton seeks to be paid a total of \$5,450.00 consisting of one week’s notice, loss of wages for one week until he obtained alternative employment, and the sum of \$100.00 per week for 29 weeks, being the difference in pay between the earnings at his new position compared with his earnings at ESSL. Given my following findings as to Mr Walton’s contribution pursuant to s.124 of the Act, he is not entitled to reimbursement of wages for more than 3 months as provided by s.128 of the Act.

- [33] I must also consider the fact that both parties to this matter had clearly decided that the employment relationship was no longer compatible and were seeking to negotiate terms of severance. The principle of a severance had been accepted. Only the sum to be paid remained unsettled. Furthermore, the notice period claimed by Mr Walton and the loss of wages for one week is the same thing.
- [34] I conclude that the termination of Mr Walton’s employment was inevitable. It was simply a question of when and on what terms. While one can not be sure, I doubt whether Mr Walton’s employment would have continued for more than a further four weeks, even that may be somewhat optimistic. However, in order to strike a reasonable balance, I will assess the loss of income by Mr Walton for four weeks.

[35] Therefore, subject to a reduction as follows, I award Mr Walton payment of wages for one week (\$1,275.00) and three weeks difference in earnings (\$300.00), a total gross sum of \$1,575.00.

Compensation – s 123(c)(i)

[36] Mr Walton claims the sum of \$8,000.00. I have to say that I saw no evidence of any damage to Mr Walton, directly related to his dismissal, that warrants an award of compensation. It is also clear, that Mr Walton was resigned to the fact, that the termination of the employment relationship was inevitable. He was a willing participant in negotiating a severance arrangement. Taking those two factors into account, I decline to make any award of compensation.

Reduction under s 124 of the Act

[37] I have found that Mr Blundell did have reasonable grounds to believe that there had been misconduct by Mr Walton of sufficient gravity to warrant his dismissal. It is also my conclusion, that the misconduct of Mr Walton, in regard to the anomalies in his time sheets were of such a nature that Mr Blundell was entitled to conclude that the necessary trust and confidence in Mr Walton was eroded to such a degree, that dismissal was an option reasonably available.

[38] There was also the matter involving Mr Goodwin, being a young worker influenced to change his time sheet by Mr Walton. Given all of that, I must conclude that the contributing behaviour of Mr Walton, to the situation that gave rise to the personal grievance, was so substantial, that the remedy of loss of wages should be reduced by 100% resulting in no payment due.

The loss of wages while attending disciplinary meetings

[39] Mr Walton claims the sum of \$330.00 as payment for 11 hours attendance at disciplinary meetings that he alleges went unpaid. However, as he has not provided any evidence to support this claim, I am unable to determine it and must decline the claim.

Disadvantage claim

[40] While this claim was not urged upon the Authority to any great degree, for reasons of completeness, I record that I have not found any tangible evidence that Mr Walton suffered any unjustified disadvantage in his employment.

Costs

[41] Given the outcome of this matter, it seems appropriate that costs should lie where they fall. It is now so ordered.

The Correct Identity of the Respondent

[42] Granite Transformations Limited was incorrectly cited by the Applicant as the Respondent party. It has since been mutually accepted that the entity that employed Mr Walton is

European Stone Surfaces Limited. This determination and the record of the Authority now reflect the true legal entity.

Ken Anderson
Member
Employment Relations Authority